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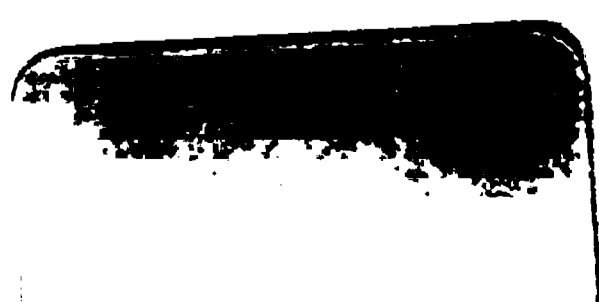
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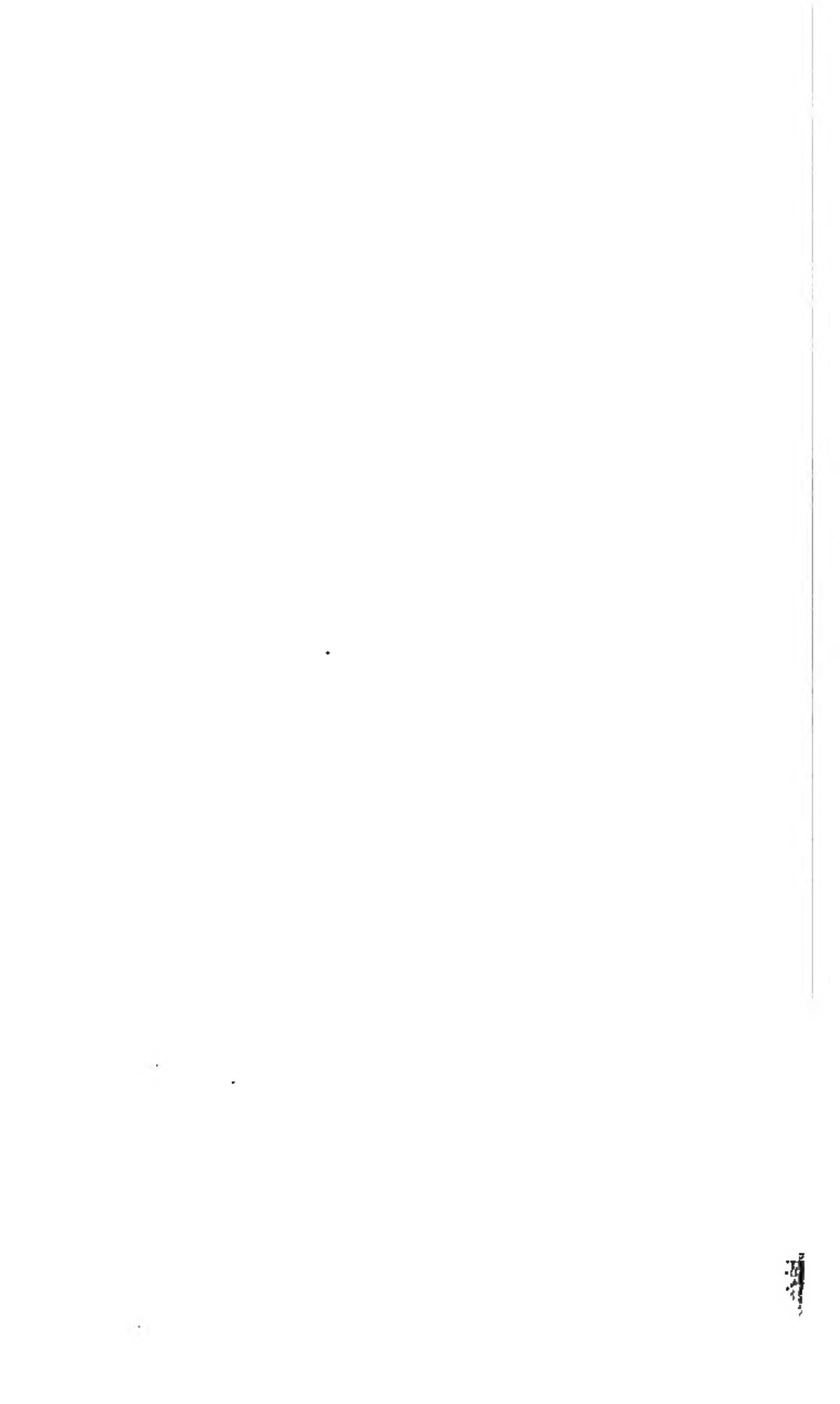


















# REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

*Circuit Court of the United States*

FOR THE SECOND CIRCUIT. .

---

BY SAMUEL BLATCHFORD,  
CIRCUIT JUDGE OF THE SECOND JUDICIAL CIRCUIT.

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VOLUME XVI.

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NEW YORK:  
BAKER, VOORHIS & CO., PUBLISHERS,  
66 NASSAU STREET.  
1880.

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**JUDGES**  
**OF THE CIRCUIT COURTS OF THE UNITED STATES**  
**WITHIN THE SECOND CIRCUIT,**  
**DURING THE TIME OF THESE REPORTS.**

---

**WARD HUNT, Associate Justice of the Supreme Court  
of the United States.\***

**SAMUEL BLATCHFORD, Circuit Judge of the Second  
Judicial Circuit.**

**DISTRICT JUDGES.**

**WILLIAM G. CHOATE, Southern District of New  
York.**

**WILLIAM J. WALLACE, Northern District of New  
York.**

**CHARLES L. BENEDICT, Eastern District of New  
York.**

**HOYT H. WHEELER, VERMONT.**

**NATHANIEL SHIPMAN, CONNECTICUT.**

---

\* At the request of Mr. Justice HUNT, the Honorable MORRISON R. WAITE, Chief Justice of the Supreme Court of the United States, held the Circuit Court of the United States for the Southern District of New York, under the provisions of § 617 of the Revised Statutes of the United States, and decided the cases which are stated in this volume to have been decided by him.

*\*.\* The following corrections should be made in Volume 15 of these Reports:*

Page 298, line 2 of head note, for "K" read "B."

" 581, " 4 of syllabus 4, for "K" read "B."

*\*.\* The following corrections should be made in this Volume:*

Page 15, line 8, for "1866" read "1799."

" 256, last line, for "cause" read "course."

# CASES

## REPORTED IN THIS VOLUME.

### A

Adriatic (The).....	424
Alcott v. Young.....	134
Allen (Harvey v.).....	29
American Central Ins. Co.(Grace v.)	433
Anilin v. Cochrane.....	155
Anthony (Gordon v.).....	234
Arlington (First National Bank v.)	57
Arthur (Butterfield v.).....	216
Atlantic Giant Powder Co.v.Parker	281
_____ v. Rand.	250

### B

Bennett (United States v.).....	338
Bennington (First National Bank v.)	53
Blanche Page (The).....	1
Brandon Mfg. Co. v. Prime.....	453
_____ (Prime v.).....	453
Brooks v. Phoenix Mutual Life Ins.	
Co.....	182
Buffalo Park (United States v.)...	189
Burdett v. Estey.....	105
Butterfield v. Arthur.....	216

### C

Child (Filley v.).....	376
Cissel v. McDonald.....	150
Clarke v. Johnson.....	495
Cochrane (Anilin v.).....	155
Codman v. Vermont & Canada R.	
R. Co.....	165
Colgate v. Gold & Stock Telegraph	
Co.....	503
Corbett v. Gibson.....	384, 386

### D

Dahlman (Wormser v.).....	319
Davis v. Pendergast.....	565

De Florez v. Raynolds.....	397
De Grief (United States v.).....	20
Dorset (First National Bank v.)...	62
D. S. Gregory (The).....	542
Dyer (Travers v.).....	178

### E

E. H. Coffin (The).....	421
Estey (Burdett v.).....	105

### F

Fidelity (The).....	569
Filley v. Child....	376
Firemen's Fund Ins.Co.(Robbins v.)	
	122, 232
First National Bank v. Arlington..	57
_____ v. Bennington	53
_____ v. Dorset....	62
Fischer v. Wilson.....	220
Fletcher v. Selden.....	468
Frerichs (United States v.).....	547

### G

Gallagher ( <i>In re</i> ).....	410
Gardner v. Herz.....	308
Gibson (Corbett v.).....	334, 386
Gold & Stock Telegraph Co. (Col-	
gate v.).....	503
Gordon v. Anthony.....	234
Grace v. American Central Ins. Co.	433

### H

Harvey v. Allen.....	29
Hatch (Stough v.).....	238
Havre (The)....	427
Herz (Gardner v.).....	308

## I

Ingersoll v. Jewett.....	378
<i>In re</i> Gallagher.....	410
— Leszynsky.....	9
— Nims.....	489
— Shipping Commissioner.....	92
— Wilson.....	112
Iron Clad Mfg. Co. ( <i>Tift v.</i> ).....	48

## J

Jackson (United Nickel Co. v.).....	68
Jewett ( <i>Ingersoll v.</i> ).....	378
Johnson ( <i>Clarke v.</i> ).....	495
Julia Blake ( <i>The</i> ).....	472

## L

Lamoille Valley Railroad Co. (Mer- cantile Trust Co. v.).....	324
Leszynsky ( <i>In re</i> ).....	9
Livingston v. Proprietors.....	549

## M

McDonald ( <i>Cissel v.</i> ).....	150
McLean v. St. Paul & Chicago Rail- way Co.....	309
McMann ( <i>Nelson v.</i> ).....	139
Manhattan Brass Co. (United Nickel Co. v.).....	68
Mercantile Trust Co. v. Lamoille Valley Railroad Co.....	324
Moller ( <i>United States v.</i> ).....	65
Morris ( <i>United States v.</i> ).....	138
Mutual Benefit Life Ins. Co. ( <i>Rob- inson v.</i> ).....	194

## N

National School Furniture Co. v. Paton.....	563
Nelson v. McMann.....	139
Niagara ( <i>The</i> ).....	516
Nims ( <i>In re</i> ).....	489
North Star ( <i>The</i> ).....	80

## O

Oceanic Steam Navigation Co. v. Tappan.....	296
Osseo ( <i>The</i> ).....	587

## P

Parker (Atlantic Giant Powder Co. v.).....	281
Paton (National School Furniture Co. v.).....	563
Pendergast ( <i>Davis v.</i> ).....	565
Phelps v. Town of Yates.....	192
Phoenix Mut. Life Ins. Co. ( <i>Brooks v.</i> )	182
— (Watts v.).....	228
Prime v. Brandon Mfg. Co.....	453
— (Brandon Mfg. Co. v.).....	453
Proprietors ( <i>Livingston v.</i> ).....	549

## R

Rand (Atlantic Giant Powder Co. v.)	250
Raynolds ( <i>De Florez v.</i> ).....	397
Reissner v. Sharp.....	383
Reynolds ( <i>Vanderbilt v.</i> ).....	80
Robbins v. Firemen's Fund Ins. Co.	122, 282
Robinson v. Mutual Benefit Life Ins. Co.....	194

## S

St. Paul & Chicago Railway Co. ( <i>McLean v.</i> ).....	309
Sandy Hook ( <i>The</i> ).....	587
Scotland ( <i>The</i> ).....	427
Selden ( <i>Fletcher v.</i> ).....	468
Sharp ( <i>Reissner v.</i> ).....	383
Shipping Commissioner ( <i>In re</i> )...	92
Shortsleeves (Steam Stone Cutter Co. v.).....	381
Southern Home ( <i>The</i> )...	447
Steam Stone Cutter Co. v. Short- sleeves.....	381
Stough v. Hatch.....	233

## T

Tappan (Oceanic Steam Naviga- tion Co. v.).....	296
The Adriatic.....	424
— Blanche Page.....	1
— D. S. Gregory.....	542
— E. H. Coffin.....	421
— Fidelity.....	569
— Havre.....	427
— Julia Blake.....	472
— Niagara.....	516
— North Star.....	80

# CASES REPORTED.

vii

The Osseo.....	537
— Sandy Hook.....	537
— Scotland.....	427
— Southern Home.....	447
Tift v. Iron Clad Mfg. Co.....	48
Town of Yates (Phelps v.).....	192
Travers v. Dyer.....	178

## U

United Nickel Co. v. Jackson...	68
— v. Manhattan Brass Co. ....	68
United States v. Bennett.....	338
— v. Buffalo Park.....	189
— v. De Grieff .....	20
— v. Frericha .....	547
— v. Moller .....	65
— v. Morris.....	138

## V

Vanderbilt v. Reynolds.....	80
Vermont & Canada R. R. Co. (Cod- man v.).....	165

## W

Watts v. Phoenix Mutual Life Ins. Co. ....	228
Wilson (Fischer v.).....	220
— (In re).....	112
Wormser v. Dahlman.....	319

## Y

Young (Alcott v.).....	134
------------------------	-----

# APPENDIX.

I. Rules.....	577
---------------	-----

# CASES

## CITED IN THIS VOLUME.

A	
Aldis v. Lamoille Valley R. R. Co.	64
Alexander v. Newman.....	465
Alexandria Canal Co. v. Swan....	201
Andrews v. Pond.....	175, 176
Anilin v. Higgin.....	155
Arthur v. Sussfield.....	218
Ashcroft v. Walworth.....	249
Atlantic & Gulf R. R. Co. v. Georgia.....	55
Atlantic Giant Powder Co. v. Goodyear.....	267
_____ v. Mowbray.....	266
_____ v. Rand.....	281
Aurora v. West.....	54
Avery v. Springport.....	193

B	
Badger v. Badger.....	560, 561
Bank v. Concord..	55, 58, 63
Barney v. Baltimore City.....	153
Barry v. Brune.....	211
_____ v. Equitable Life Society.....	195, 207, 213
_____ v. Kennedy.....	413
Bean v. Smallwood.....	138
Beardaley v. Littell.....	337
Belding v. Manly...	331
Bennington v. Park.....	55, 63
Benson v. Monroe.....	300
Boulton v. Bull.....	159
Bradlaugh v. The Queen....	348, 350
Bright v. Milwaukee R. R. Co. ...	318
Brinkerhoff v. The Board of Education.....	572
Broadnax v. Eisner.....	318
Broderick's Will.....	561
Brooks v. Aston.....	139
_____ v. Vt. Central R. R. Co.	328, 331
Brown v. Piper.....	139
Brunton v. Hawkes.....	139
Buerk v. Imhaeuser.....	408
Burdett v. Estey.....	105

Burton v. Norwich.....	59
Bush v. Fox.....	139

C	
Cabot v. Britt.....	59
Cadle v. Tracy.....	37
Campbell v. Hall.....	380
Carpenter v. Millard.....	328
Chamberlain v. Ward.....	85
Chapman v. Coffin.....	374
Cheever v. Birchard.....	329
_____ v. Rutland & Burlington R. R. Co.....	175, 177
Colgate v. Western Union Telegraph Co.....	503
Collins v. Blantern.....	466
Commonwealth v. Dorus.....	375
_____ v. Durfee.....	375
_____ v. Holmes.....	344, 345, 346
_____ v. Landis.....	351
_____ v. Sharpless.....	345
_____ v. Tarbox.....	344
Conn. L. Ins. Co. v. Burroughs....	213
Cook v. City of Boston.....	302
Coolidge v. Hagar.....	382
County of Henry v. Nicolay.....	55
Cromwell v. County of Sac... ..	54, 194
Cummings v. Missouri... ..	19
Cunningham v. Boston.....	300
_____ v. Monroe.....	301
Cutler v. Rice.....	407
Cuyler v. Bradt.....	455

D	
Darlington v. The Mayor.....	571
Deems v. Albany & Canal Line...	92
DeWolf v. Johnson.....	175
Dibble v. Angur.....	250
Dix v. Dummerston... ..	59
Doe v. The Earl of Derby.....	380
Downs v. Belden.....	459
Draper v. Hudson.....	245
Dunbar v. Myers.....	139
Dyer v. Homer.....	465

E

Eadie v. Slimmon...	195, 206, 208, 211
East Lincoln v. Davenport.....	64
Envelope Co. v. Seymer.....	139
Estabrook v. Dunbar.....	77
<i>Ex parte</i> Burrell.....	117
— — — — Garland.....	19
— — — — Hamlin.....	117
— — — — Jackson.....	848
— — — — Lange.....	16, 17
— — — — Weston.....	446
Eyster v. Gaff.....	41

F

First Nat. Bank v. Arlington.....	62
— — — — v. Bennington..	57, 62
Forryth v. Woods.....	444
Fox v. Dellestable.....	189
Fuller v. Dame.....	466

G

Gayler v. Wilder.....	147
Gelpcke v. Dubuque.....	55, 58
Gill v. Wells.....	109, 110
Girardey v. Moore.....	821
Godin v. London Assurance Co....	130
Goodyear v. Bishop.....	148
— — — — v. McBurney.....	148
Gould v. Rees.....	109

H

Hailes v. Van Wormer.....	188
Hanington v. Du Chatel.....	466
Hartell v. Tilghman.....	467
Hartshorn v. Day.....	457, 468
Harwood v. Railway Co.....	139
Hay v. La Neve.....	82
Heckers v. Fowler.....	201
Henderson v. The Mayor.....	297
Hendrie v. Sayles.....	457
Henry v. Providence Tool Co....	394
Hepburn v. Ellzey.....	152
Hicks v. Kelsey.....	138
Hitchcock v. Tremaine.....	407
Hoare v. Oriental Bank.....	446
Hollister v. Pawlet.....	59
Home Ins. Co. v. Baltimore Ware- house Co.....	126
Hornblower v. Boulton.....	159
Horton v. Mabon.....	139

B

Hotchkiss v. Greenwood.....	138
Howes v. Nute.....	245
Howton v. Frearson.....	382

I

Imlay v. Norwich & Worcester R. R. Co.....	245
India R. Co. v. Phelps.....	407
<i>In re</i> Janeway.....	120
— — Reiman.....	117
— — Rosenberg.....	52
— — Shipping Commissioner.....	103
— — Sutherland.....	416
— — Van Auken.....	117
— — Wronkow.....	115, 118
Insurance Co. v. Pechner.....	311

J

Jackson v. Twentyman.....	151
Johnson v. Morrell.....	314
Jones v. Morehead.....	188
Jordan v. Dobson.....	245
— — v. Moore.....	139

K

Kay v. Marshall.....	139
Kelleher v. Darling.....	107
Keystone Bridge Co. v. Phoenix Iron Co.....	77
Klein v. New Orleans.....	571
Kleinwort v. The Cassa Marittima.	491
Knight v. R. R. Co.....	138
Knowles v. The State.....	349
Knox Co. v. Aspinwall.....	54
— — v. Wallace.....	54

L

Lane v. The Denike.....	86
Langdon v. De Groot.....	138
— — v. Keith.....	331
Latham v. The Queen.....	24
Lathrop v. Drake.....	53
Law v. Law.....	466
Lawrence v. Stearns.....	374
La Ysabel.....	490
Leffingwell v. Warren.....	58
Lenox v. Winisimmet Co.....	85
Leonard v. City of Brooklyn..	571, 572
Liford's Case.....	382

Littlefield v. Perry.....	148
Livingston v. Hubbs.....	407
Lord Darcy v. Askwith.....	882
Losh v. Hague.....	189

## M

McCreary v. Commonwealth.....	874
McGinnity v. White.:.....	316
McNair v. The People.....	347
Maddox v. Fisher. ....	88
Mahn v. Harwood.....	189
Marshall v. Balt. & O. R. R. Co..	466
Martin v. Franklin Ins. Co.....	281
Mayor of Baltimore v. Lefferman..	301
Mays v. Cincinnati.....	302
Milburn v. Salkeld.....	458
Milligan & Higgins Glue Co. v. Upton.....	138
Moore v. Marsh.....	249
Mossman v. Higginson .....	151

## N

National Bank v. Colby.....	37, 41
Neafie v. Cheesebrough.....	203
Needham v. Washburn.....	189
Nelson v. McMann.....	248
Nevins v. Johnson.....	244
Newell v. West.....	457, 468
New Orleans v. Winter.....	153
Nichols v. Luce.....	382
North British Ins. Co. v. London Ins. Co.....	131

## O

O'Neil v. Sears.....	86
Orenson v. Clarke.....	189
Osgood v. Chicago R. R. Co.....	318

## P

Palmer v. Lorillard.....	486
Parkes v. Stevens.....	189
Parsons v. Thompson.....	466
Partridge v. Davis.....	173
Pechner v. Phoenix Ins. Co.....	312
Peck v. Jenness.....	327
Penn v. Bibby.....	189
Pennsylvania College Cases.....	55
Phillips v. Page .....	138
Phillpots v. Phillpots.....	465
Picquet v. Swan.....	153
Pingry v. Washburn.....	466
Pinney v. Fellows .....	455
Poillon v. The Mayor.....	572

Pomfret v. Ricroft.....	392
Potter v. Holland.....	148
Powers v. Skinner.....	466
Prentiss v. Brennan.....	152, 158
Prevost v. Gratz.....	407
Pritchard v. Hennessey.....	374
Propagation Society v. Ballard...	380
Prouty v. Ruggles.....	109

## R

Railroad Co. v. Commissioners...	301
—— v. Trimble.....	457
Ralston v. Smith.....	189
Reckendorfer v. Faber.....	189
Regina v. Hicklin.....	366
Reims v. People.....	375
Rex v. Arkwright.....	159
—— v. Jervis .....	24
—— v. Woolf.....	378
Rubber Tip Pencil Co v. Howard.	188
Ruggles v. Eddy.....	406
Rushton v. Crowley.....	189

## S

Sandford v. Norton.....	178
Sandiman v. Breach .....	190
Saunders v. Aston.....	189
Sellers v. Dickinson.....	110
Shaw v. Chamberlin.....	328
Sherman v. Bingham .....	53
Sickles v. Gloucester Mfg. Co.....	244
Skinner v. McDaniel.....	330
Slacum v. Pomery.....	176
Smith v. Baker's Admrs.....	245
—— v. L. & N. W. R. W. Co....	108
—— v. Nichols.....	188
Somerset Potters Works v. Minot.	446
State v. Engle.....	375
—— v. Keach.....	24
—— v. Parker.....	25
—— v. Tudor.....	64
—— v. Weber.....	375
Steam Cutter Co. v. Sheldon.....	388
Steele v. Brannan.....	368
Steiner v. Heald.....	159
Stephens v. Cady.....	249
Stevens v. Gladding.....	234, 245, 249
Stimpson v. Woodman.....	188
Sullivan v. Railroad Co.....	561
Sylvester v. Downer.....	173

## T

Taylor v. Board of Health.....	302
Tetley v. Easton.....	189
The Agra.....	84

## xi

The America.....	89
Athol.....	574
Austin.....	86
Baltic.....	86
Bay State.....	85
Bedford.....	86
Bonaparte.....	484, 490, 492
Cargo ex Sultan.....	484, 490
Cassa Marittima.....	484
City of Hartford.....	89
Commonwealth v. Carrington.	373
Corinna.....	84
Davis.....	578
De Cock.....	82
Dumfries.....	88
Empire State.....	87
Eureka.....	484, 491
Fanny Fern.....	85
Favorita .....	86
Fyenoord .....	88
Grace Girdler.....	450
Gratitudine.....	484, 490
Hamburg.....	484, 490, 492
Hibernia.....	88
Inflexible.....	575
James .....	88
Karnak....	484, 491
King v. Kinnear.....	374
— v. Woolf.....	374
Lizzie.....	493
Lord Hobart.....	575
Marcia Tribou.....	86
Maria Martin.....	86, 90
Marquis of Huntley.....	575
Mary Patten .....	87
Miranda .....	85
Monarch.....	82
Nautilus .....	85
N. Hooper.....	486
Onward.....	484, 491, 498
Oratava.....	82
Oriental.....	490, 491
Paterson.....	86
People v. Douglass.....	373
— v. Girardin .....	346
— v. Hallenbeck.....	349
— v. Ransom.....	373
— v. Stevens.....	16
Queen v. Bradlaugh.....	343
Rival .....	84
St. Charles.....	85, 90
Sapphire.....	88
Saxonia.....	83
Schooner Catherine v. Dickinson.	85, 90
Siren.....	578
State v. Brown.....	346
— v. Hanson.....	349
Swallow.....	575
Washington.....	82
The Wood Paper Patent.....	160
Town Council of Cahaba v. Burnett.....	302
Township of Rock Creek v. Strong.	60
Tracy v. Atherton.....	382
— v. First National Bank.....	88
Twyne's Case.....	465
<b>U</b>	
Union Paper Bag Machine Co v. Pultz and Walkley Co.....	76
United Nickel Co. v. Harris.....	68
United States v. Clafin .....	14
— — v. Cruikshank...21,	27
— — v. Foote.....	351
— — v. Gates.....	14
— — v. McKee....15, 19,	29
— — v. O'Keefe.....	574
— — v. Perchman .....	385
— — v. Shellmire.....	138
— — v. Wiltberger.....	19
Upton v. Tribilcock.....	560, 561
<b>V</b>	
Vance v. Campbell.....	109
Vanderbilt v. Reynolds.....	541
Vasse v. Comegys .....	417
— v. Mifflin.....	153
Vaux v. Shaffer .....	88
Vt. & Canada R. R. Co. v. Vt. Central R. R. Co.....	167, 172
Vincent v. Horlock.....	174
<b>W</b>	
Watson v. Jones.....	327
Webster Loom Co. v. Higgins....	407
Wescott v. Fairfield.....	158
Wheeler v. Wheeler.....	459
White v. Toms.....	189
Williamson v. Colcord.....	417
Wilmerding v. Russ.....	562
Wilson v. Lawrence .....	195, 209
— v. Rousseau.....188, 457,	466
Winans v. R. R. Co.....	138
Wing v. Hall.....	459
Winslow v. Draper.....	374
— v. Grindal.....	380
Wood v. Merrow.....	180
Woodworth v. Rogers.....	564
— v. Wilson.....	148
Wright v. Parker.....	331
<b>Y</b>	
York, &c., R. R. Co. v. Myers....	201
Yulee v. Vose.....	317



CASES  
ARGUED AND DETERMINED  
IN THE  
Circuit Courts of the United States  
WITHIN THE SECOND CIRCUIT.

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THE BLANCHE PAGE.

There is no statute of the United States which authorizes or requires sureties in stipulations or appeal bonds, in a suit *in rem*, in Admiralty, to appear before the Admiralty Court, after a final decree in the suit, for examination concerning their property, according to the laws and practice of the Courts of the State.

The mode of enforcing a final decree for the payment of money, in a suit *in rem*, in Admiralty, is that prescribed by Rule 21, in Admiralty, by execution. A Court of Admiralty of the United States has no power to enforce such a decree against such sureties by the sequestration of their property, according to the practice of Courts of equity.

Nor can it punish such sureties for contempt for not performing their stipulations, or for failing to comply with the provisions of the decree.

The abolition of imprisonment for debt, in New York, makes it impossible for the Circuit Court of the United States, in New York, to use imprisonment as a remedy in execution of a judgment requiring the payment of money due on such stipulations or appeal bonds.

(Before BLATCHFORD, J., Southern District of New York, February 12th, 1879.)

BLATCHFORD, J. These are two suits *in rem*, in Admiralty, originally instituted, one by Lewis W. Phillips and the other by Francis Markee, in the District Court, and brought, by appeals taken by the claimant, Edward Moran, into this Court. On the 22d of August, 1867, the vessel being in the

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The Blanche Page.

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custody of the marshal, under the processes issued by the District Court in the two suits, the claimant, with J. C. Hartt and Thomas Cassidy, as sureties, gave a stipulation for value, in each suit, in the sum of \$2,500, consenting and agreeing thereby, that, in case of default or contumacy on the part of the claimant or his sureties, execution for \$2,500 might issue against their goods, chattels and lands, the condition of each stipulation being, that the stipulators should, upon the interlocutory or final order or decree of the District Court, or of any appellate Court to which the suit might proceed, and upon notice of such order or decree to the proctor for the claimant, abide by, and pay the money awarded by, the final decree rendered by the District Court, or the appellate Court, if any appeal should intervene. On the giving of such stipulations, the vessel was discharged from custody. At the same time, the same parties gave a stipulation for costs, in each suit, in the sum of \$250, consenting, that, in case of default or contumacy on the part of the claimant or his sureties, execution for the sum of \$250 might issue against their goods, chattels and lands, each stipulation being to the effect, that the stipulators should be, and each of them was, thereby bound, in the sum of \$250, conditioned that the claimant should pay all costs and expenses which should be awarded against him by the final decree of the District Court, or, upon an appeal, by the appellate Court. A final decree in favor of the libellant was rendered by the District Court in each suit. The decree in the Phillips suit was made May 3d, 1872, and provided, that the libellant recover against the vessel \$2,740 62 damages and \$274 77 costs. The decree in the Markee suit was made August 13th, 1871, and provided, that the libellant recover against the vessel \$2,027 56 damages and \$320 22 costs. Each decree provided, that, out of the proceeds of the stipulations of the claimant for costs and value, when paid into the registry, the clerk should pay to the libellant the amounts so decreed; and that, unless an appeal should be taken within the prescribed time, the stipulators for costs and value should forthwith pay into Court the amount of

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The Blanche Page.

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their said stipulations, and that the clerk, after deducting the taxed costs of the officers of the Court in the action, distribute the proceeds in satisfaction of the decree. In each case the claimant took an appeal to this Court from such final decree. In each case the claimant, with Edward K. Godfrey and Asa D. Dickinson, as sureties, executed a joint and several bond to the libellant, on appeal, conditioned that the libellant should prosecute said appeal with effect, and pay all damages and costs which should be awarded against him as appellant, if he should fail to make such appeal good. The bond in the Phillips case was dated May 22d, 1872, and was in the penalty of \$4,000. The bond in the Markee case was dated September 19th, 1871, and was in the penalty of \$3,000. This Court made a final decree in each suit on the 2d of January, 1875, affirming the decree of the District Court. In the Phillips suit the decree further provided, that the libellant recover against the vessel \$3,015 39, the amount of the decree of the District Court, and \$562 27 interest thereon, and \$195 05 as costs of this Court, amounting in all to \$3,772 71; that the vessel be condemned therefor; and that, in pursuance of the Act of March 3d, 1847, a summary judgment be and was entered against the vessel and the claimant and the said sureties, on the bond given on the appeal, for the sum of \$4,000, the amount of said bond. In the Markee suit the decree further provided, that the libellant recover against the vessel \$2,347 78, the amount of the decree of the District Court, and \$548 69, interest thereon, and \$197 05, as costs of this Court, amounting in all to \$3,093 52; that the vessel be condemned therefor; and that, in pursuance of the Act of March 3d, 1847, a summary judgment be and was entered against the vessel and the claimant and the said sureties, on the bond given on the appeal, for the sum of \$3,000, the amount of said bond. The claimant took an appeal, in each suit, to the Supreme Court of the United States, from such final decree of this Court. In each case the claimant, with Edward K. Godfrey and James C. Hartt, as sureties, executed a joint and several bond to the libellant, on appeal, conditioned

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The Blanche Page.

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that the appellant should prosecute said appeal to effect and answer all damages and costs, if he should fail to make his appeal good. The bond in each case was dated January 15th, 1875. That in the Phillips case was in the penalty of \$7,500. That in the Markee case was in the penalty of \$6,200. The Supreme Court made a decree in each suit, affirming the decree of this Court, with costs, and interest until paid, at the same rate per annum that decrees bear in the Courts of the State of New York. It further decreed, in each case, that the libellant recover against the claimant \$144 75, costs of the Supreme Court. On the 25th of July, 1878, on the presentation to this Court of the mandate of the Supreme Court in each case, a decree was made by this Court, in the Phillips case, that the libellant recover the said sum of \$3,772 71, and interest thereon from January 2d, 1875, amounting to \$957 26, together with \$144 75, costs, amounting, in all, to \$4,874 72, and that a summary judgment be and was entered against the claimant, (the principal,) and Edward K. Godfrey and James C. Hartt, (the sureties,) on the bond on appeal to said Supreme Court, for the sum of \$7,500, the amount of their bond, and that execution issue thereon; and a decree was made by this Court in the Markee case, that the libellant recover the said sum of \$3,093 52, and interest thereon from January 2d, 1875, amounting to \$756 09, together with \$144 75, costs, amounting, in all, to \$3,994 36, and that a summary judgment be and was entered against the claimant, (the principal,) and Edward K. Godfrey and James C. Hartt, (the sureties,) on the bond on appeal to said Supreme Court, for the sum of \$6,200, the amount of their bond, and that execution issue thereon.

It is now shown to this Court, on behalf of the libellants, that the said Cassidy has died during the pendency of said appeals; that the said Dickinson has removed to Michigan; that, on the 19th of August, 1878, executions were duly issued to the marshal of the United States for this District, and have been returned wholly unsatisfied; that the said Hartt resides in the State of New Jersey, and owns real property

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The Blanche Page.

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there, but carries on business in the city of New York; that the said Godfrey resides in the city of New York; that the said Moran resides in the State of New Jersey; and that the said Dickinson resides at Detroit, in the State of Michigan. On the foregoing facts, and on notice to said Godfrey and said Hartt, and the proctors for the claimant, the libellants now move this Court, "that James C. Hartt and Edward K. Godfrey, sureties upon the stipulations entered into herein, and sureties upon the appeal to the Supreme Court of the United States, be ordered to appear before this Court for examination concerning their property, according to the laws and practice of the State of New York," and "that they be ordered to disclose all information concerning their property, with a view to the sequestration thereof, and that they be directed to convey all of their property to a sequestrator to be appointed by this Court, and that the said James C. Hartt and Edward K. Godfrey be punished for their contempt in not performing their said stipulations, and failing to comply with the provisions of said decrees, and for such other order or relief as may be just."

(1.) As to so much of the motion as asks that the sureties be ordered to appear before this Court for examination concerning their property, according to the laws and practice of the State of New York. There is no statute of the United States which authorizes or requires such an examination in a suit in Admiralty. Sections 914, 915 and 916 of the Revised Statutes apply solely to common law suits. Section 941 provides for such stipulations for value as were given in these cases, and enacts that judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause. Rule 21, in Admiralty, provides, that, "in all cases of a final decree, for the payment of money, the libellant shall have a writ of execution, in the nature of a *fiery facias*, commanding the marshal, or his deputy, to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate, of the defendant or stipulators." There is no other Rule as to the

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The Blanche Page.

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enforcing a decree in a suit *in rem*. That Rule is one of a series of Rules made by the Supreme Court under § 6 of the Act of August 23d, 1842, (5 *U. S. Stat. at Large*, 518,) now § 917 of the Revised Statutes, which provides that the Supreme Court shall have the power to prescribe the forms of process, the modes of proceeding to obtain relief, and generally to regulate the whole practice in suits in Admiralty, by the Circuit and District Courts. Nothing is found which authorizes what is asked for under the first branch of the motion.

(2.) As to so much of the motion as asks that the sureties be ordered to disclose all information concerning their property, with a view to the sequestration thereof, and that they be directed to convey all of their property to a sequestrator, to be appointed by this Court. There is no statute which confers on a Court of Admiralty of the United States those powers of sequestering property which appertain to a Court of equity, nor is there any Rule which does so. The libellants have judgments, and, after executions have been issued and returned unsatisfied, they can resort to the proper Court to reach any property which the debtors may have. But this Court, sitting in Admiralty, is not such Court. The fact that the libellants could not recover judgments on the stipulations or bonds in any other Court than the Admiralty Court, does not prevent their resorting to other Courts, where they have obtained judgments in the Admiralty Court, to enforce such judgments. The judgments have then become like any other judgments *in personam* in any Court. In a suit *in rem*, where the Court has acquired jurisdiction of the *res*, and has not voluntarily yielded possession of it, and has a right to recall it to its custody, it may proceed to do so, as against those who have it or have taken it; but that is not the present case. (*Rule 38.*) The libellants are general creditors, by judgment *in personam*, of the sureties. The stipulations and bonds are merely to pay money, and the judgments are money judgments. The stipulators for value could not now perform the condition of their stipulation, by bringing the vessel into Court.

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The Blanche Page.

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(3.) As to so much of the motion as asks that the sureties may be punished for contempt in not performing their said stipulations and failing to comply with the provisions of said decrees. At most, the stipulations, bonds and decrees create a debt from the sureties to the libellants. The decrees are decrees for the payment of money, and only for that. Prior to the December Term, 1861, of the Supreme Court, Rule 21, in Admiralty, read thus: "In all cases where the decree is for the payment of money, the libellant may, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in the nature of a *capias* and of a *fiery facias*, commanding the marshal, or his deputy, to levy the amount thereof of the goods and chattels of the defendant; and, for want thereof, to arrest his body to answer the exigency of the execution. In all other cases, the decree may be enforced by an attachment to compel the defendant to perform the decree; and, upon such attachment, the defendant may be arrested and committed to prison until he performs the decree, or is otherwise discharged by law, or by the order of the Court." At the December Term, 1861, the Supreme Court abolished that Rule and substituted the following in its place, as Rule 21: "In all cases of a final decree for the payment of money, the libellant shall have a writ of execution in the nature of a *fiery facias*, commanding the marshal, or his deputy, to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate, of the defendant or stipulator." It is quite clear that the Supreme Court intended to abolish attachments to compel the performance of general money decrees.

Although this Court has, under § 725 of the Revised Statutes, power to punish, as a contempt of its authority, the disobedience of any party, or other person, to any lawful writ, process, order, rule, decree or command made by it, yet it cannot properly punish, as such a contempt, the failure of these sureties to pay these money judgments. By Rule 48, in Admiralty, made at the December Term, 1850, of the Supreme Court, it is provided as follows: "Imprisonment for

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The Blanche Page.

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debt, on process issuing out of the Admiralty Court, is abolished in all cases where, by the laws of the State in which the Court is held, imprisonment for debt has been, or shall be hereafter abolished, upon similar or analogous process issuing from a State Court." By § 990 of the Revised Statutes of the United States it is provided as follows: "No person shall be imprisoned for debt in any State, on process issuing from a Court of the United States, where, by the laws of such State, imprisonment for debt has been or shall be abolished. And all modifications, conditions and restrictions upon imprisonment for debt, provided by the laws of any State, shall be applicable to the process issuing from the Courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the Courts of such State." The stipulations and bonds in this case are contracts, and contracts to pay money. The decrees are judgments requiring the payment of money due upon contracts. By the statutes of New York, imprisonment for debt is abolished as a remedy in execution of a judgment requiring the payment of money due on a contract, such as the contracts in this case. (*Laws of New York, of 1831, Ch. 300, § 1; Code of Procedure, §§ 12, 548 to 550, 1240, 1487.*)

The motion is denied, in all its branches.

*George A. Black*, for the motion.

*Abiathar B. Millard* and *Jacob Vanatta*, opposed.

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*In re Samuel H. Leszynsky, on Habeas Corpus.*

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IN THE MATTER OF SAMUEL H. LESZYNSKY, ON HABEAS  
CORPUS.

Section 3,318 of the Revised Statutes of the United States provides that any person who commits any one of the offences therein specified shall pay a penalty of \$100, and shall, on conviction, be fined not less than \$100, nor more than \$5,000, and imprisoned not less than 3 months, nor more than 3 years. The United States brought a civil suit against L. to recover the penalty of \$100 imposed by that section for an offence therein specified, and recovered a judgment therefor, which was paid and satisfied of record. Afterwards L. was arrested on a warrant for the same offence, and was committed for trial. On a *habeas corpus*: *Held*, that the criminal proceeding by the warrant was not a proceeding to punish him twice for the same offence.

The three punishments—the penalty, the fine and the imprisonment—are only one punishment for the same offence, although the penalty is recovered in a civil action, and the fine and imprisonment are inflicted by a criminal prosecution.

(Before BLATCHFORD, J., Southern District of New York, February 13th, 1879.)

BLATCHFORD, J. Section 3,318 of the Revised Statutes is in these words: "Every rectifier and wholesale liquor dealer shall provide a book, to be prepared and kept in such form as may be prescribed by the Commissioner of Internal Revenue, and shall, on the same day on which he receives any foreign or domestic spirits, and before he draws off any part thereof, or adds water or anything thereto, or in any respect alters the same, enter in such book, and in the proper columns respectively prepared for the purpose, the date when, the name of the person or firm from whom, and the place whence, the spirits were received, by whom distilled, rectified or compounded, and when and by whom inspected, and, if in the original package, the serial number of each package, the number of wine gallons and proof gallons, the kind of spirit, and the number and kind of adhesive stamps thereon. And every such rectifier and wholesale dealer shall, at the time of sending out of his stock or possession any spirits, and before the same are removed from his premises, enter in like man-

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*In re Samuel H. Leszynsky, on Habeas Corpus.*

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ner in the said book, the day when, and the name and place of business of the person or firm to whom, such spirits are to be sent, the quantity and kind or quality of such spirits, the number of gallons and fractions of a gallon at proof, and, if in the original packages in which they were received, the name of the distiller and the serial number of the package. Every such book shall be at all times kept in some public or open place on the premises of such rectifier or wholesale dealer for inspection, and any revenue officer may examine it and take an abstract therefrom; and when it has been filled up as aforesaid, it shall be preserved by such rectifier or wholesale liquor dealer for a period not less than two years; and during such time it shall be produced by him to every revenue officer demanding it. And whenever any rectifier or wholesale liquor dealer refuses or neglects to provide such book, or to make entries therein as aforesaid, or cancels, alters, obliterates, or destroys any part of such book, or any entry therein, or makes any false entry therein, or hinders or obstructs any revenue officer from examining such book, or making any entry therein, or taking any abstract therefrom, or whenever such book is not preserved or is not produced by any rectifier or wholesale liquor dealer as hereinbefore directed, he shall pay a penalty of one hundred dollars, and shall, on conviction, be fined not less than one hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years." This section is, in all material respects, a re-enactment of § 45 of the Act of July 20th, 1868, (15 *U. S. Stat. at Large*, 143.) In the first edition of the Revised Statutes, the words "on conviction," found in said § 45, were omitted from said § 3,318, but, by the Act of February 27th, 1877, (19 *Id.*, 248,) said § 3,318 was amended by inserting said words "on conviction," that Act stating that such amendment, with others, was made "for the purpose of correcting errors and supplying omissions" in the Revised Statutes, "so as to make the same truly express" the statutes of the United States in force on the 1st of December, 1873. Said § 3,318, as above quoted,

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*In re Samuel H. Leszynsky, on Habeas Corpus.*

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is quoted as it is printed in the second edition of the Revised Statutes, except that the word "quality" is printed "quantity," by mistake, in the second edition, the word being "quality" in the first edition and in said § 45.

The United States, on the 13th of January, 1879, brought a civil action, in the District Court of the United States for this District, against Samuel H. Leszynsky and Charles A. Troup, the complaint in which set forth, "that, at the time hereinafter mentioned, the defendants were partners in business, under the firm name of Leszynsky & Troup, at No. 26 Beaver street, in the city of New York, and then and there carried on the business of wholesale liquor dealers and rectifiers; that, in and during the year 1878, the defendants, at the city of New York, received certain distilled spirits which they failed and neglected to enter in the book required by law to be kept by them as such wholesale liquor dealers and rectifiers, and, therefore, by virtue of the premises, and by force of the statute of the United States in such case provided, the defendants became liable to pay to these plaintiffs the sum of one hundred dollars, (\$100,) which said sum remains due and unpaid; wherefore plaintiffs demand judgment against the defendants for the sum of one hundred dollars, besides the costs of this action." The defendants appeared by attorney in said action, and put in an answer, which stated, that the defendants, "for answer to the complaint, say nothing in bar or preclusion of the suit of the said plaintiffs." On the 20th of January, 1879, an order was made by said District Court, "that the plaintiffs have judgment for their claim, together with costs and disbursements of this action, to wit, the sum of one hundred and fifteen dollars," and "that the clerk enter judgment for said amount." On the same day a judgment in said action was entered, "that the plaintiffs have judgment for their claim, together with costs and disbursements of this action, to wit, the sum of one hundred dollars, and that they have execution therefor." On the same day an order was made by said District Court, reciting that a judgment had been entered in said action for

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*In re Samuel H. Leszynsky, on Habeas Corpus.*

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\$115, and that the defendants' attorney had paid into the registry of said Court the sum of \$115 in satisfaction of said judgment, and ordering that said judgment be satisfied and cancelled of record. Afterwards, on the same day, a United States Commissioner issued a warrant to the marshal, setting forth that complaint on oath had been made to him, "charging that Samuel H. Leszynsky and Charles A. Troup were, at the times hereinafter mentioned, rectifiers and wholesale liquor dealers, doing business at No. 26 Beaver street, New York city, did, on or about the 29th of October and 18th day of November, in the year one thousand eight hundred and seventy-eight, at the Southern District of New York, unlawfully neglect to make any entry whatever in the book kept by them, the form whereof had theretofore been prescribed by the Commissioner of Internal Revenue, of spirits then and there sent out by them of their stock and possession, before the said spirits were removed from their premises, and, further, they did, as such wholesale liquor dealers and rectifiers, on or about the 18th day of November, 1878, in said District, unlawfully neglect to make any entry in their said book, of spirits then and there sent out by them of their stock, before the said spirits were removed from their premises, and the spirits here mentioned are not those stated hereinbefore, and for similar offences on the 30th of October and 15th day of December, 1878," and commanding the marshal to apprehend the said Leszynsky and Troup. Under this warrant Leszynsky was arrested and brought before the Commissioner, and an examination was had, and, on the 23d of January, the Commissioner committed him to the custody of the marshal, for trial, in default of \$1,000 bail. He has now been brought before this Court on a writ of *habeas corpus* issued by it, and the proceedings which took place before the Commissioner are before this Court on a writ of *certiorari*. At the examination before the Commissioner, the defendant put in evidence the said proceedings in said civil action, and, while admitting that there was probable cause to hold him under said warrant, but for said proceedings, contended, and here con-

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*In re Samuel H. Leszynsky, on Habeas Corpus.*

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tends, that, in consequence of such proceedings, he is not liable to be again arrested, held, detained, tried, convicted or punished for the same cause, and that an arrest and detention under said warrant is for the same cause for which he was punished by the payment of said judgment.

It is contended, for the relator, that, if he shall be convicted, and fined and imprisoned for the offences alleged in the warrant, he will be punished twice for the same statutory offence; and that he was completely punished for the offences alleged in said warrant, by the payment of said judgment.

It is to be noted that § 3,318 provides distinctly, that, whenever any rectifier or wholesale liquor dealer does what is specified therein he shall pay a penalty of \$100 *and* shall, on conviction, be fined and imprisoned. No more distinct form of expression could have been adopted to indicate the intention of Congress to provide cumulative penalties or punishments, three in number, each in addition to the other two—a penalty of \$100 to be recovered by a civil action, and fine and imprisonment to follow conviction on a criminal prosecution. But, in the eye of the law, the three punishments are only one punishment for the same offence, although the penalty of \$100 may be recovered in a civil action, and the fine and imprisonment are inflicted by a criminal prosecution. The statute book has many like provisions for punishment of offences, where a penalty to be recovered by a civil action is given, and a fine and imprisonment, or one of them, on a criminal conviction, is prescribed in addition and cumulatively, by the use of the word “and.” Provisions for punishment by the forfeiture of property, which must be enforced in a civil action, and, cumulatively and in addition, by fine and imprisonment, or one of them, on a criminal conviction of the same offence for which the forfeiture of property is prescribed, are of the same character. Where the same section of the statute contains the description of the offence, and the prescription of the penalty by civil suit, and of the punishment on a criminal conviction, the two connected by the

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*In re Samuel H. Leszynsky, on Habeas Corpus.*

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copulative "and," no other construction is proper than that the whole is one punishment, and that the whole cannot be satisfied by a part. Reference, for provisions of the above descriptions, in the same title in which § 3,318 is found, may be had to sections 3,257, 3,258, 3,259, 3,260, 3,279, 3,292, 3,296, 3,326, 3,340, 3,342, 3,360, 3,370, 3,380, and 3,401. Penalties and forfeitures given by statute are to be enforced by civil suits. (*Rev. Stat.*, § 563, *subd.* 3; *Id.*, § 919.) Fine and imprisonment are to be inflicted as the result of a conviction on a criminal prosecution. Different methods are to be resorted to to enforce the different parts of what is one and the same punishment. But, the fact that the two methods may be progressing simultaneously and one be completed before the other, or that one may be fully completed before the other is commenced, cannot have the effect to annul the provision of law in regard to the uncompleted part. The views above expressed are in harmony with those of the Supreme Court in the recent case of *United States v. Claflin*, (7 *Otto*, 546,) where the provisions of § 3,082 of the Revised Statutes were under consideration, as § 4 of the Act of July 18th, 1866, (14 *U. S. Stat. at Large*, 179.) That section provides, as a punishment for the fraudulent importation of merchandise, a forfeiture of the merchandise, and a fine or imprisonment, or both. The Court construe the section as having in view not only punishment of the offence described but indemnity to the Government for loss sustained in consequence of the criminal conduct of those guilty of the offence; and say that the forfeiture of the goods was designed to secure indemnity to the Government for the wrong done, and that the fine and imprisonment "were superadded, as a vindication of public justice."

The case of *United States v. Gates*, (5 *Law Reporter*, 465,) in the District Court of the United States for this District, before Judge Betts, in 1845, is cited on the part of the relator. In that case Gates had been indicted and convicted, under § 19 of the Act of August 30th, 1842, (5. *U. S. Stat. at Large*, 565,) for smuggling and clandestinely introducing into

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*In re Samuel H. Leszynsky, on Habeas Corpus.*

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the United States certain goods, with a view to defraud the revenue of the United States, and had thereon been sentenced to pay a fine of \$2,000 and to be imprisoned 30 days. That specific offence was made punishable by that statute and the sentence was a lawful one. Gates had paid the fine and suffered the imprisonment. Afterwards a civil suit was brought by the United States against Gates, under § 50 of the Act of March 2d, 1866, (1 *U. S. Stat. at Large*, 665,) to recover the penalty thereby imposed, of \$400, for landing the same goods without a permit. The defendant pleaded in bar the conviction and sentence and punishment aforesaid. The plea was demurred to, and was held good by the Court, on two grounds: (1,) that, as the United States had obtained judgment and inflicted punishment on the defendant for an offence, they were prohibited, by general principles of law, from prosecuting him again for acts constituting the same offence, or, in other words, which, if proved, would call for his conviction of that offence; and, (2,) because the punishment provided by the Act of 1842 was not cumulative, and to be imposed in addition to that prescribed by the Act of 1799. The present is a different case. The fine and imprisonment provided by § 3,318 are cumulative to the penalty of \$100, and are to be imposed in addition; and the United States are not prosecuting the relator a second time for the same offence.

The case of *United States v. McKee*, (4 *Dillon*, 128,) also relied on by the relator, is like the Gates case, and different from the present one. McKee had been indicted and convicted, under § 5,440 of the Revised Statutes, for taking part in a conspiracy to defraud the United States of taxes due on distilled spirits, in pursuance of which conspiracy his co-conspirators unlawfully removed such spirits. He was sentenced to pay a fine and be imprisoned. Afterwards, under § 3,296, he was sued in a civil action, by the United States, to recover a penalty of double the amount of the taxes on certain distilled spirits, out of which the Government alleged it was defrauded by means of a conspiracy entered into for that purpose by

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*In re Samuel H. Leszynsky, on Habeas Corpus.*

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McKee and certain distillers, for the unlawful removal, by the distillers, of said spirits, without the payment of taxes. It was alleged that McKee aided and abetted in such removals. The defendant pleaded in bar such indictment, conviction and sentence. The overt acts charged in the indictment, were alleged to be the unlawful removal of the same distilled spirits, without the payment of taxes, for which the penalty sought to be recovered in the civil suit was denounced by § 3,296. The defendant also pleaded in bar a pardon by the President. The United States demurred to the pleas, and the pleas were held good.

There is nothing in the decision in *Ex parte Lange*, (18 Wallace, 164, 168,) considered with reference to the facts of that case, which sustains the claim of the relator in this case.

As was said by the Court in *The People v. Stevens*, (13 Wendell, 341:) “It is undoubtedly competent for the Legislature to subject any particular offence both to a penalty and a criminal prosecution; it is not punishing the same offence twice. They are but parts of one punishment; they both constitute *the* punishment which the law inflicts upon the offence. That they are enforced in different modes of proceeding, and at different times, does not affect the principle. It might as well be contended that a man was punished twice, when he was both fined and imprisoned, which he may be in most misdemeanors.”

It is urged that the word “and,” after the words “penalty of one hundred dollars,” in § 3,318, should be read “or.” As Congress unquestionably had the power to prescribe the entire punishment provided by § 3,318, quite as much as they have to prescribe fine and imprisonment in any case, it must be held that the word “and” has its natural and cumulative meaning.

The 5th amendment to the Constitution of the United States provides that no person shall “be subject, for the same offence, to be twice put in jeopardy of life or limb.” It is contended, for the United States, that the judgment in the civil suit, and the payment of it, did not subject the relator

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*In re Samuel H. Leszynsky, on Habeas Corpus.*

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to be put in jeopardy of his life or limb. But, even though the spirit of this amendment be to prevent a second punishment, under judicial proceedings, for the same crime, so far as the common law gave that protection, (*Ex parte Lange*, 18 Wallace, 163, 170,) yet the criminal proceeding now instituted against the relator will not produce a second punishment for the same offence, but will only complete, on conviction, the punishment intended by Congress. The 5th amendment was proposed by Congress on the 25th of September, 1789, and was ratified by eleven States in that year and the following two years. But, that amendment has not been regarded by Congress as preventing legislation such as that found in the statute now in question. Thus, by the Act of July 31st, 1789, (1 *U. S. Stat. at Large*, 46,) it was provided, that, if goods entitled to drawback were entered for exportation and were afterwards landed, they and the vessel from which they were landed, and the boats used in landing them, should be forfeited, and all persons concerned therein should, on conviction, be imprisoned. This same provision was re-enacted as section 60 of the Act of August 4th, 1790, (1 *U. S. Stat. at Large*, 174,) and as section 82 of the Act of March 2d, 1799, (*Id.*, 692,) and is now found in § 3,049 of the Revised Statutes. It would necessarily sometimes happen that the owner of the forfeitable goods would be concerned in landing them, and thus he would be punishable both by having his goods forfeited and by being imprisoned on conviction, the forfeiture of goods being enforced in a civil suit and the conviction taking place in a criminal proceeding. So, in § 24 of the Act of March 2d, 1799, (1 *U. S. Stat. at Large*, 646,) it was provided, that, if goods should be imported in violation of the statute as to a manifest, the master in command of the vessel should forfeit and pay a sum of money equal to the value of such goods not included in the manifest, and all such goods, not included in the manifest, belonging to him, should be forfeited. It was made the duty of the master in command to make and sign and have the manifest, and thus, in respect to goods not manifested, which belonged

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*In re Samuel H. Leszynsky, on Habeas Corpus.*

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to him, he would be punished by losing the goods in a suit *in rem*, and also by paying their value again, as the result of a suit *in personam*. This provision is re-enacted in § 2,809 of the Revised Statutes. In § 46 of the Act of March 2d, 1799, (1 *U. S. Stat. at Large*, 662,) it was provided, that, when any articles subject to duty are found in the baggage of any person arriving in the United States, which shall not, at the time of making entry for such baggage, be mentioned to the collector before whom such entry is made, by the person making the same, all such articles so found shall be forfeited, and the person in whose baggage they shall be found shall, moreover, forfeit and pay treble the value of such articles. Under this provision, if the person in whose baggage the articles were found was the owner of them, and if he made the entry, he would forfeit the articles in a suit *in rem* and pay treble their value in a suit *in personam*, as one punishment for the offence. This provision is re-enacted in § 2,802 of the Revised Statutes.

Provisions are found in the statutes, where, when Congress has intended that a person who would otherwise be subject to two distinct provisions of the same section should be exempt from one, if subject to the other, it has said so distinctly. Thus in § 34 of the Act of September 1st, 1789, (1 *U. S. Stat. at Large*, 64, 65,) it was provided, that, on conviction of any of certain neglects or offences against the Act for registering vessels, the offender should forfeit \$1,000 and be rendered incapable of serving in any office of trust or profit under the United States; and, further, that, if any person required by the Act to perform any thing should wilfully neglect or refuse to do so, he should, on conviction, "if not subject to the penalty and disqualification aforesaid," forfeit \$500 for the first offence, and a like sum for the second offence, and should, from thenceforward, be rendered incapable of holding any office of trust or profit under the United States. This provision was re-enacted in § 26 of the Act of December 31st, 1792, (1 *U. S. Stat. at Large*, 298,) and a like provision is found in § 29 of the Act of February 18th, 1793,

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*In re Samuel H. Leszynsky, on Habeas Corpus.*

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(*Id.*, 315.) These provisions are now found in §§ 4,187, 4,188, 4,373 and 4,374 of the Revised Statutes. The restriction found in them is a recognition of the principle of the 5th amendment and of the doctrine of the case of *United States v. McKee*. But, the fact of such restriction, and the punishment of the offences named by a pecuniary forfeiture or penalty and by a disqualification to hold any office of trust or profit under the United States, shows that Congress did not regard the punishment by a pecuniary forfeiture or penalty, and by a disqualification in addition, as within the inhibition of the 5th amendment. The imposition of the forfeiture or penalty is a punishment. Indeed, §§ 4,187 and 4,188 use the words "punishable by a fine," instead of the word "forfeit," found in the Act of 1792, while §§ 4,373 and 4,374 use the words "liable to a penalty," instead of the word "forfeit," found in the Act of 1793, and § 4,188 refers to the punishment by a fine, prescribed by § 4,187, as a "penalty." The disqualification to hold office is a punishment, under the decisions of the Supreme Court in *Cummings v. Missouri*, (4 *Wallace*, 277,) and *Ex parte Garland*, (*Id.*, 333.)

The proper conclusion from these considerations is, that Congress had power to prescribe the punishment by the penalty and the fine and the imprisonment, prescribed by § 3,318, as a punishment the whole of which may be imposed; and that the language is such as to indicate an intention that the whole shall be imposed. The language of Chief Justice Marshall, in *United States v. Wiltberger*, (5 *Wheaton*, 76, 95,) is applicable to this case: "Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the Legislature. The maxim is not to be so applied as to narrow the words of the statute, to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the Legislature has obviously used them, would comprehend. The intention of the Legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed,

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The United States v. De Grief.

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which would justify a Court in departing from the plain meaning of words, especially in a penal Act, in search of an intention which the words themselves did not suggest.”

It follows, that the relator is not, by what took place in the civil action, exempted from criminal prosecution, under § 3,318, in respect to the matter covered by the complaint in such civil action ; and that he is not entitled to be discharged on *habeas corpus*.

*Roger M. Sherman*, for the relator.

*Stewart L. Woodford*, (*District Attorney*,) for the United States.

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THE UNITED STATES

vs.

ANTHONY DE GRIEFF AND OTHERS.

An indictment for a violation of § 5,440 of the Revised Statutes of the United States, charged that the defendants conspired to commit an offence against the United States, that is, to wilfully conceal and destroy certain papers relating to certain merchandise called dress trimmings, liable to duty, which had been theretofore imported and brought into the United States, and the port of New York, from a foreign port, by A., for the purpose of suppressing certain evidence of fraud therein contained, describing the papers and averring that they contained statements from the consignors of A., addressed to and received by him in the due course of his business, showing that said merchandise had been knowingly and fraudulently entered and passed through the custom house at New York, on a false classification thereof as to value, and by the payment of less than the duty legally due to the United States, and which papers were material and important evidence for the United States in any proceedings because of said fraudulent entry, and alleging various acts charged to have been done to effect the object of the conspiracy. On a motion to quash the indictment, it was objected, that it was bad for uncertainty,

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The United States v. De Grieff.

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because it omitted to state facts showing the commission of a fraud upon the United States in connection with the importation of the merchandise, and because the contents of the papers were not so stated as to enable the Court to see that they contained evidence of that fraud: *Held*, that the indictment was sufficient.

By § 5,443 of the Revised Statutes, it is made an offence to conceal or destroy papers of the description given in said indictment. What it would be necessary to aver and prove on an indictment under § 5,443, *querre*.

The case of *United States v. Cruikshank*, (2 Otto, 542,) commented on and distinguished.

The defendants, though indictable under § 5,443, not having been indicted thereunder, may be indicted under § 5,440.

(Before BENEDICT, J., Southern District of New York, February 15th, 1879.)

BENEDICT, J. This case comes before the Court on a motion to quash the indictment. The provision of law under which the indictment is framed is to be found in section 5,440 of the Revised Statutes, where it is provided, that, "if two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years." Under this section, it is sought, by the present indictment, to charge the defendants with having conspired to commit one of the offences against the United States which are created by section 5,443 of the Revised Statutes. The language of that section is as follows: "Every person who wilfully conceals or destroys any invoice, book or paper relating to any merchandise liable to duty, which has been or may be imported into the United States from any foreign port or country, after an inspection thereof has been demanded by the collector of any collection district, or at any time conceals or destroys any such invoice, book or paper, for the purpose of suppressing any evidence of fraud therein contained, shall be punished by a fine of not more than five thousand dollars, or by imprisonment not more than two years, or both."

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The United States v. De Grieff.

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The first count charges, that, at a certain time and place, the defendants conspired to commit an offence against the United States, that is to say, to wilfully conceal and destroy certain papers relating to certain merchandise called dress trimmings, liable to duty, which had been theretofore imported and brought into the United States and the port and collection district of New York, from a foreign port, by the firm of A. De Grieff & Co., for the purpose of suppressing certain evidence of fraud against the United States, therein contained. Then follows a description of the papers referred to, coupled with the averment, that said papers contained statements from the correspondents, consignors, and purchasing agents of the said firm of A. De Grieff & Co., addressed to and received by said firm in the due course of their business, showing and tending to show that said merchandise had been knowingly and fraudulently entered and passed through the custom-house, the office of the collector of the port and collection district of New York, upon a false classification thereof as to value, and by the payment of less than the amount of duty legally due to the United States, and which said papers were material and important evidence for the United States in any proceedings because of said fraudulent entry. Then follows a statement of various acts charged to have been done to effect the object of the conspiracy.

The second count begins with reciting the pendency of a suit *in rem* for the forfeiture and condemnation, to the use of the United States, of certain trimmings which had been imported as stated in the first count, for a violation of the laws of the United States, in the importation of said merchandise, and, also, of a suit against the defendants De Grieff and Triacca, for the recovery of damages for a violation of the laws of the United States, in the said importation. It then charges a conspiracy, as in the first count, describing the papers as in the first count, and avers that said papers contained statements from the correspondents, consignors, and purchasing agents of De Grieff & Co., addressed to and received by said firm in the due course of their business, show-

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The United States v. De Grieff.

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ing and tending to show fraud and violation of the laws of the United States, in the said importation, which papers were evidence for the United States in the prosecution of the suits aforesaid, and in any proceeding by the United States because of the violation of the laws of the United States, in the importation of said merchandise. Then follows a statement of acts done to effect the object of the said conspiracy, as in the first count.

The third count charges a conspiracy to commit an offence against the United States, that is to say, to wilfully conceal and destroy certain papers relating to certain merchandise, a full description of which is unknown, liable to duty, which had been theretofore imported, for the purpose of suppressing certain evidence of fraud against the United States, therein contained, following with a description of the papers, and a statement of acts done, as in the first count.

The fourth count, after reciting, in the language of the second count, the pendency of suits, charges a conspiracy to commit an offence against the United States, that is to say, to wilfully conceal and destroy certain invoices and papers relating to said dress trimmings, liable to duty, which had been theretofore imported, as stated in the first count, for the purpose of suppressing certain evidence of fraud upon the United States in said importation, following with a list of the said papers described, and averring that said invoices and papers contained statements from the correspondents, consignors, and purchasing agents of De Grieff & Co., addressed to and received by them in the due course of their business, showing and tending to show fraud against the United States, in the importation of said merchandise, and which said papers were important and material evidence for the United States in the prosecution of the said suits, and in any proceedings by the United States because of the violation of the laws of the United States, in the importation of said merchandise. A statement of acts done to effect the object of the conspiracy is then given, as in the first count.

The indictment concludes with the averment, that, by the

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The United States v. De Grieff.

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means aforesaid and in the manner aforesaid, according to the conspiracy, combination and agreement aforesaid, the defendants committed an offence against the United States.

To this indictment it is objected, that it is bad for uncertainty, because it omits to state facts showing the commission of a fraud upon the United States in connection with the importation of the merchandise described, and because the contents of the papers are not so stated as to enable the Court to see that they contained evidence of that fraud.

In support of the objection that the indictment contains no facts showing the commission of a fraud, the argument made is this: Unless there was a fraud upon the United States in connection with the importation of the merchandise described, the papers described could not have contained evidence of such a fraud, and there could be no conspiracy to destroy what did not exist. The foundation of the charge, therefore, is a fraud upon the United States in connection with the importation in question, and facts must be stated to show the commission of such a fraud. The difficulty with this argument, when applied to a case like the present—for a similar argument has been made without avail in regard to indictments for receiving stolen goods and the like, (*Roscoe's Crim. Ev.*, 867; *Archbold's Cr. Pr.*, 939; *Rex v. Jervis*, 6 C. & P., 156; see, also, forms, *Archbold's Cr. Pr.*, 441, 869,) —is, that it proceeds upon the assumption, that the substance of the offence charged is the fraud upon the United States in the importation of the merchandise described. But, the indictment is for a conspiracy to commit an offence against the United States, not for a fraud upon the United States. The rule applicable to indictments of this character has been thus stated: "When looking at a charge of conspiracy to commit an offence, we do not require it (the offence) to be set forth with all the precision requisite in describing the offence itself." (*Latham v. The Queen*, 5 Best & Smith, 635.) The result of the cases upon the subject in this country is thus stated in *State v. Keach*, (40 Vermont, 113, 117:) "The adjudged cases uniformly recognize the rule, that a

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The United States v. De Grieff.

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general allegation that two or more persons conspired to effect an object criminal in itself, as to commit a misdemeanor or felony, is sufficient, even though the indictment omits all charges of the particular means to be used." In *State v. Parker*, (43 N. H., 83, 84,) it is said; "If it" the object of the conspiracy "is not an offence at common law, but only by statute, the purpose of the conspiracy must be set forth in such manner as to show that it is within the terms of the statute." Judged by these rules, the present indictment is sufficient. It shows that the defendants conspired to commit an offence against the United States, by averring that the object of the conspiracy was to conceal and destroy certain described papers relating to certain described merchandise liable to duty, and theretofore imported into the United States at the port of New York, from Paris, by the firm of De Grieff & Co., for the purpose of suppressing evidence of fraud against the United States, therein contained. The facts which are here stated consist of an act and an intent, *i. e.*, that the defendants agreed together to do a certain act, namely, to conceal and destroy certain papers, for a purpose designated; and, by section 5,443, the concealment or destruction of papers of the description given, for the purpose stated, is made an offence against the United States. The indictment, therefore, sets forth the purpose of the conspiracy in such manner as to show that it is within the terms of the statute, and, accordingly, is within the requirement of the law, as stated in the cases above cited.

What it would be necessary to aver and prove if this were an indictment for the offence created by section 5,443, it is unnecessary to determine on this occasion, but, it may be remarked, that a construction of the section that would require proof of a fraud as to which the papers destroyed contained evidence, would nullify the statute in many cases, such, for instance, as where the papers destroyed contain the only evidence of a necessary link in the proof of the fraud. It could hardly have been intended that the successful result of the prohibited act should render its punishment impos-

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The United States v. De Grieff.

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sible. But, however this may be in the case of a prosecution for the offence created by section 5,443, in a case like this, where the substance of the charge is an unlawful agreement made for the purpose of effecting a certain result, to require the circumstances attending the fraud to be set forth, would be to require a statement of the evidence intended to be adduced to prove the facts averred. An objection which, in some cases of conspiracy, may be made, that, owing to the circumstances of the case, the indictment, although sufficient in law, fails to inform the particular defendant of the act intended to be proved against him, is, in such cases, met by the tender of particulars. That objection cannot be here made, for the reason, that this indictment, in addition to stating the conspiracy with due particularity of time and place, gives a description of the papers sufficient to identify them, and as full as the circumstances will permit, and, with as much particularity as can be asked where, from the nature of the case, the papers are not under the control of the prosecution, points out the matter in the papers which it was the object of the conspirators to suppress, and thus fully informs the defendant of the charge upon which he is to be tried.

It is further objected, that the indictment fails to show to the Court that the matter in the papers would be evidence of a fraud upon the United States. There is no occasion to question the necessity, which this indictment assumes, of proving, in a case like this, that the result sought to be attained by the agreement to destroy these papers was the suppression of evidence of fraud contained in the papers. But, that is a fact to be shown by evidence as to the terms of the agreement and the surrounding circumstances. Whether those facts and circumstances will warrant the jury in saying that the result which the defendants sought to attain by this conspiracy was that charged in the indictment, is to be determined when the evidence has been given at the trial. It cannot now be determined by the Court. Plainly, it would be impossible for the indictment to show to the Court that the matter contained in the letters destroyed tended to show that

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The United States v. De Grieff

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a fraud had been committed, unless it contained the evidence going to explain the statements in the letters, and their significance as bearing upon the question of fraud ; and there is no ground to contend that such should be the contents of an indictment of this character. What has, in cases similar, been deemed sufficient for an indictment, may be seen by referring to the form of an indictment for conspiring to suppress evidence, given in 5 *Cox's C. C., appendix, No. 3, p. 9.*

The decision of the Supreme Court of the United States in *United States v. Cruikshank*, (2 *Otto*, 542,) has been pressed upon my attention, as a controlling authority adverse to the conclusion above indicated. But, the indictment in Cruikshank's case was not for a conspiracy to commit an offence, and the determination in respect thereto cannot, therefore, be authority in a case like this. That indictment was under the 6th section of the enforcement Act of May 30th, 1870, (16 *U. S. Stat. at Large*, 141,) now found, in a modified form, in section 5,508 of the Revised Statutes, which makes it an offence against the United States to conspire to do certain described acts with a certain described intent. The ingredients of the offence are found in the provision creating it, and the Court held that all those ingredients must be stated in the indictment, with such specification of detail as to enable the Court to see that the offence created by the enforcement Act had been committed. The present indictment is for a conspiracy of a different character, made an offence by a different statute, and having different ingredients. By the section under which this indictment is drawn, a crime is committed when the agreement is to commit any offence against the United States, without regard to the result sought to be attained by making the agreement. It is true, that the opinion of the Supreme Court in the case of Cruikshank deals, to a certain extent, with the general requisites of an indictment ; but I fail to find there any indication of an intention to lay down a rule in regard to the requirements of an indictment like the present, or to state any rule at variance with the law declared in the cases

from which I have above quoted. On the contrary, two of those cases are cited with apparent approval, in the opinion of the Court. The opinion, indeed, supports the present indictment, for, by way of illustration, it refers to a statute of Maine similar in character to the statute upon which this indictment is drawn, where it is made an offence to conspire to commit any crime punishable by imprisonment in the State prison; but it points out, that an indictment under the statute of Maine, to be good, must specify the crime charged as the object of the conspiracy, so as to enable the Court to see whether it be one punishable by imprisonment in the State prison. The present indictment, so judged, is sufficient, for, the charge made is not general, that the defendants conspired to commit an offence against the United States, but it descends to particulars and particularizes the act as being an agreement between the defendants to conceal and destroy certain described papers relating to the importation of certain merchandise, entered into by the defendants for the purpose of suppressing evidence of fraud in connection with that importation, contained therein. The act thus particularized is made by statute an offence against the United States, and it thus appears, that, if proved, it will support a conviction under section 5,440. While, therefore, the determination in Cruikshank's case cannot control the determination in any case like this, the opinion there delivered is in harmony with the conclusion that the present indictment is sufficient in law to put the defendants upon their trial.

The remaining objection to be considered is, that, upon the showing of the indictment, the defendants should have been charged under section 5,443 and cannot be charged under section 5,440. This objection is not pressed upon the ground of merger. Clearly, it could not be pressed on that ground, for, there is no merger in crimes of equal rank, such as misdemeanors. (*United States v. McKee*, 4 *Dillon*, 128.) But, it is supposed that a different ground is taken, by claiming that the facts stated in the indictment show that the conspiracy complained of forms part of an accomplished crime,

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Harvey v. Allen.

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made punishable by section 5,443, and cannot, therefore, be made the subject of a prosecution under section 5,440. But, if there be no merger, there is no force in this suggestion. It may well be, that one who has been once tried upon a charge of an offence under section 5,443 cannot be again tried under section 5,440, for a conspiracy that formed an element of the offence already tried. No such question is here raised. Here, the question is, whether it is competent for the Government to put the defendants upon trial for having done what by section 5,440 is made an offence against the United States, they never having been before called in question for that act. That offence not having been merged in any other offence, there is no possible ground on which to decide that it cannot be prosecuted. The case of McKee, above cited, is an authority adverse to such a contention.

The motion to quash is, for these reasons, denied.

*William P. Fiero*, (*Assistant District Attorney*,) for the United States.

*Robert S. Green* and *Aaron J. Vanderpoel*, for the defendants.

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JOEL D. HARVEY, RECEIVER OF THE SCANDINAVIAN NATIONAL  
BANK OF CHICAGO

vs.

BENJAMIN F. ALLEN AND OTHERS. IN EQUITY.

After a circulating note of a national bank, which it had failed to redeem in lawful money, had been protested, under § 46 of the Act of June 3d, 1864, (18 *U. S. Stat. at Large*, 113,) an attachment from a State Court was levied on moneys of said bank on deposit in another national bank, to secure a debt from it to A. Subsequently, a receiver of the bank was appointed, under § 50 of said Act: *Held*, that, under § 52 of said Act, said levy was void.

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Harvey v. Allen.

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The receiver, having applied to the State Court to dissolve such attachment, without becoming a party to the suit in the State Court, and such motion being denied, and he having then immediately brought this suit against A., and the bank in which the moneys were on deposit, and the sheriff who levied the attachment, to assert his title to such moneys: *Held*, that he was entitled to such relief.

A. having, after process in this suit was served on the defendants, obtained a judgment in his suit in the State Court, and collected it by execution against the moneys so attached, this Court decreed that A. should pay directly to the plaintiff the money he had so collected, and the bank in which the moneys had been on deposit should pay such money if, and only if, it could not be collected from A.; that such bank should pay costs to the plaintiff; that such bank should not have costs against A.; that A. should pay costs to the plaintiff; that the sheriff should not have costs against the plaintiff; that the plaintiff should recover from A. the costs of making the sheriff a party, and the costs of the sheriff's defence, the latter costs to be paid over to the sheriff by the plaintiff, when collected; and that the bank in which the moneys had been on deposit should respond to the plaintiff for them, with interest from the time when process in this suit was served on it, subject to the said decree as to payment by A. of what he had received of such moneys.

(Before BLATCHFORD, J., Southern District of New York, February 19th, 1879.)

BLATCHFORD, J. The Scandinavian National Bank of Chicago was a bank organized under the national banking Act, and subject to its provisions. It was located at Chicago, Illinois. On the 10th of December, 1872, it failed to redeem a circulating note of the denomination of \$5, issued by it, when payment thereof was legally demanded at its office in Chicago, during the usual hours of business. On the same day a notary public duly protested said note for non-payment, and served a written notice of the protest on the president of the bank, and it stopped doing business, and a United States bank examiner took possession of all of its books and assets. Section 46 of the Act of June 3d, 1864, (13 *U. S. Stat. at Large*, 113,) provides, that, if any national bank shall fail to redeem in lawful money any of its circulating notes, when payment thereof shall be lawfully demanded, during the usual hours of business, at its office, they may be protested by a notary public. The notary is required to give notice of the protest to the president or cashier of the bank, and to forward notice of the protest to the comptroller of the

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Harvey v. Allen.

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currency. Section 50 authorizes the comptroller, on becoming satisfied, as above specified, that any bank has so refused to pay its circulating notes and is in default, to forthwith appoint a receiver, who, under the direction of the comptroller, shall take possession of the books, records and assets of the bank, and collect its debts. Provision is made for the receiver to turn the assets into money and pay such money to the treasurer of the United States, and for the comptroller to distribute such money *pro rata* among the creditors of the bank. Section 52 is in these words: "All transfer of the notes, bonds, bills of exchange and other evidences of debt owing to any association, or of deposits to its credit, all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor, all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this Act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." On the 18th of December, 1872, the comptroller, by an instrument in writing reciting the necessary preliminary facts, appointed the plaintiff in this suit to be receiver of said bank, with all the powers, duties and responsibilities given to or imposed upon a receiver under the provisions of said Act. At the time the Scandinavian Bank failed, the National Broadway Bank, another national bank, located in the city of New York, and one of the defendants in this suit, had on deposit moneys belonging to the Scandinavian Bank, subject to its draft. On the 9th of December, 1872, the defendants Allen, Stephens and Blennerhassett, composing the firm of Allen, Stephens & Co., held a sight draft drawn by the Scandinavian Bank on the Broadway Bank, for \$650. On that day they presented the same for payment to the latter bank, but it was not paid, and thereupon it was duly protested and notice given to the former bank. On the 12th of December,

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Harvey v. Allen.

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a warrant of attachment was issued out of the Supreme Court of New York, on the application of Allen, Stephens & Co., in an action in said Court by them against the Scandinavian Bank, to recover \$650, with interest from December 9th, and on the ground that said bank was a foreign corporation organized under said Act of 1864, commanding the sheriff of the city and county of New York to attach and safely keep all the property of said bank within his county, or so much thereof as might be sufficient to satisfy the said demand, together with costs and expenses. On the 13th of December, this attachment was levied by the defendant Brennan, as such sheriff, on the moneys of the Scandinavian Bank in the possession of the Broadway Bank. A summons was issued in said action, dated December 12th, demanding judgment for \$650, with interest from December 9th, and costs. A complaint, setting forth the cause of action, was verified December 18th. On the 19th of December, in accordance with the State practice, an order was made by the State Court, that the summons be served by publication in two newspapers, and that a copy of the summons and complaint be deposited in the post-office, directed to the Scandinavian Bank, as defendant. On the same day the summons and complaint were filed in the State Court. On the 8th of February, 1873, the attorney of the United States for this District caused an affidavit to be made by Mr. Tremain, entitled in the suit in the State Court, reciting the proceedings therein, and setting forth that the Scandinavian Bank had suspended and become insolvent December 9th, 1872; that Mr. Harvey had been appointed its receiver, by the comptroller, under said Act; that he, said attorney, had "been instructed to act for said receiver in and about the matters and proceedings appertaining to the claim of" Allen, Stephens & Co.; and that, upon the facts so stated, and all the proceedings in said suit, and, upon the ground, among others, that the State Court had no jurisdiction, and that the continuance of the proceedings in said action, and of said attachment, was in violation of said Act of Congress, and that said attachment was issued after

## Harvey v. Allen.

the commission of an act of insolvency by the Scandinavian Bank, and with a view to prevent the application of its assets, as prescribed in said Act, and to prefer Allen, Stephens & Co., by securing to them their claim in full from such assets in preference to other creditors, or the ratable proportion of said assets that might be found due to them under said Act, the said attorney desired to move, in behalf of the defendant, to vacate said order of publication and warrant of attachment, and to stay the proceedings in said action. On said affidavits, and on an affidavit by said attorney, that one of the circulating notes of the bank was protested on December 10th, for non-payment and non-redemption, and that such fact was duly certified to the Comptroller of the Currency, a motion to the above effect was made before the State Court, on the part of the defendant, by counsel who appeared for it for the purpose of the motion. The Court, on the 5th of March, 1873, denied the motion, at special term, holding, that, so far as the defendant was concerned, the attachment was properly granted, and that, in accordance with the decision of the Court of Appeals of New York, in *Tracy v. First National Bank of Selma*, (37 N. Y., 523,) it must be held, that the receiver had no *status* in the action to make a motion to vacate the attachment, but must assert his title in some other manner. The point of the decision in the Tracy case was, that the receiver, not being a party to the suit, could not make any motion in it. The Scandinavian Bank, then, by the said attorney, who appeared for it for that purpose, took an appeal to the general term of the State Court, from the order denying such motion. On the 16th of May, 1873, the general term affirmed the order appealed from. The receiver did not make himself a party to the suit in the State Court, but, in May, 1873, he filed the bill in this suit. An amended bill was filed in June, 1873. It sets forth the substance of the matters above stated. It alleges, that, when the Scandinavian Bank became insolvent, the Broadway Bank had in its possession "certain assets" of the former bank, "and, among the same, the sum of about fifteen hundred dollars,

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Harvey v. Allen.

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more, or less, in currency, or otherwise," which the plaintiff, as receiver, and in behalf of himself and said comptroller, was entitled to demand and receive from the latter bank, and that the same has been demanded, but the latter bank has refused to deliver the same to the plaintiff or to said comptroller, or to make any disposition of the same that will enable the plaintiff to pay the same into the treasury of the United States. It alleges that the claim made under said attachment is contrary to law. It prays that an injunction may be issued, restraining the Broadway Bank from paying over said moneys to any one but the plaintiff; that Allen, Stephens & Co. and said sheriff be enjoined from proceeding on said attachment, or entering any judgment or order in said suit, or on their said claim, save in the way of presenting the same to the plaintiff as receiver, as claims entitled to no preference over those of the general creditors of the Scandinavian Bank; that the Broadway Bank pay to the plaintiff, to be by him paid into the Treasury of the United States, the said sum of \$1,500, "be the same more or less," with interest; and that a receiver of said moneys, during the pendency of this suit, be appointed.

Allen, Stephens & Co. answered, in October, 1873, setting up their claim, and said attachment and the proceedings in said suit in the State Court. Their answer also set forth, that, on the 13th of September, 1873, a judgment was recovered in said suit, against the Scandinavian Bank, for \$829 84; that, on the same day, an execution was issued on said judgment, to said sheriff; that said sheriff collected on said execution, and under said attachment, from said Broadway Bank, and paid to Allen, Stephens & Co., on the 20th of September, 1873, \$820, in full satisfaction of said judgment and of all claim of theirs under said attachment; and that Allen, Stephens & Co. claim no interest in any indebtedness of the Broadway Bank to the Scandinavian Bank or in any of the assets of the latter bank.

The sheriff answered, in October, 1873, setting up the proceedings in the suit in the State Court and the attachment

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Harvey v. Allen.

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and its levy and the judgment and execution, and the collection of the money and of fees and expenses from the attached property.

The Broadway Bank answered, in October, 1873, setting up the attachment and the proceedings in the suit in the State Court, and the judgment and execution, and the taking by the sheriff from the attached moneys in the hands of the Broadway Bank, of sufficient to satisfy the execution; that said bank has in its possession \$568 51 of said deposits of the Scandinavian Bank, and no more, subject to the order of the bank, or its legal representatives or assigns; and that said bank has not refused to pay any of said deposits to the plaintiff, except such as were so attached by the sheriff, amounting to \$876 94.

On the 9th of January, 1873, the plaintiff directed the Broadway Bank to credit itself in account with \$153 20, for a collection made by the Scandinavian Bank. On the 17th of January, 1873, the plaintiff wrote to the Broadway Bank as follows: "Your favor of 14th inst., enclosing acc't current, received. I have had it compared with the books of this bank and find it correct. You will please send me your check for balance, less amount of the two attachments and sufficient to cover costs, say about \$100 in each case. The U. S. Dist. Atty. in New York has been instructed from Washington to defend these suits, and, until decided, of course you will retain sufficient to indemnify you." On the 18th of January, 1873, the Comptroller of the Currency wrote to the Broadway Bank as follows: "I am informed that you have on deposit, to the credit of the Scandinavian National Bank of Chicago, \$2,669 35 in gold, and \$2,461 14 in currency, and that suits of attachment have been brought against the bank—one for \$650 and the other for \$441 95. This bank having been placed in the hands of a receiver, you will, on the receipt of this letter, forward the balance due the Scandinavian National Bank, less the amount which has been attached, to this office, which amount will be deposited with the treasurer, in trust, subject to my order, for the benefit of

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Harvey v. Allen.

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its creditors, as provided by the National Currency Act." On the 21st of January, 1873, the Comptroller wrote to the Broadway Bank as follows: "I have received your letter of the 20th, enclosing your certificate of deposit for \$2,664 35 gold, being balance of coin account of the Scandinavian National Bank; also your certificate of deposit for \$1,015 69, being balance of currency account, less the sum of \$1,445 45, retained to abide the result of two attachments and probable costs thereon. Please inform me of the amount of those attachments and the amount retained for costs." The \$1,445 45 was the balance of account made up with interest to December 9th, 1872, but not later. The amount paid to the sheriff by the Broadway Bank, September 20th, 1873, was \$876 94. The second attachment referred to in the correspondence was one by McKim, Brothers & Co. The record does not show how it was disposed of, but it is not set up by any of the defendants. McKim, Brothers & Co. were originally made parties defendant to this suit, but the suit was discontinued as to them. The Broadway Bank and the sheriff appeared in this suit on the 5th of July, 1873, and Allen, Stephens & Co. appeared on the 7th of July, 1873. A motion was made, on notice to all the defendants, for an injunction to restrain the Broadway Bank from paying over to any person but the plaintiff the moneys mentioned in the bill, and for the appointment of a receiver to hold said moneys until the final determination of this suit, and for an injunction to restrain all the defendants from interfering with such disposition of said moneys pending the determination of this suit, but such motion was denied by this Court by an order filed September 18th, 1873.

The case has now been brought to final hearing on pleadings and proofs. It is contended for the Broadway Bank, that the proceedings in the suit in the State Court are binding on the plaintiff, and are a bar to the relief asked by the bill in this suit; that the State Court had jurisdiction of the suit brought in it, and properly issued the attachment; that the bringing of this suit did not divest the State Court of the

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Harvey v. Allen.

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jurisdiction it so acquired; that that Court had authority to proceed in such action, and render and enforce judgment therein, so long as no defence was interposed, and so long as the insolvency of the Scandinavian Bank was not brought to the knowledge of that Court in any manner of which it could take cognizance; that the plaintiff, on motion to the State Court, could have been substituted as defendant in such action, and could then have moved to vacate the attachment, or could have defended the action; that, as the plaintiff did not intervene in that action, but allowed it to proceed to judgment, and allowed the judgment to be enforced against the attached property, he cannot maintain this suit and obtain relief which could have been obtained by him in that action, especially when the effect of such relief will be to nullify the judgment in that action and the proceedings under it; that the sheriff was required by the State law to execute the attachment and the execution; and that the Broadway Bank could not resist the processes.

The argument on behalf of Allen, Stephens & Co. is addressed principally to a questioning of the correctness of the decision of this Court in *Cadle v. Tracy*, (11 *Blatchf. C. C. R.*, 101,) to the effect, that a State Court has no jurisdiction of a suit against a national bank, where the bank is not located in such State, such jurisdiction being forbidden by § 57 of the Act of June 3d, 1864, (13 *U. S. Stat. at Large*, 116, 117.) It is also contended for them, that, if the State Court had jurisdiction to render the judgment which it did render, this Court cannot, in this suit, re-examine the matters settled by that judgment.

The decision of the Supreme Court of the United States in *National Bank v. Colby*, (21 *Wallace*, 609,) disposes of the main question in this case. In the Colby case, the First National Bank of Selma refused payment, on the 15th of April, of a treasury draft of the United States. The bank did not open for business on the 16th, and on that day the military authorities of the United States, under instructions from the Secretary of the Treasury, took possession of the

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Harvey v. Allen.

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property of the bank. On the 17th its president absconded. On that day Colby sued out an attachment, in a State Court of Alabama, against the bank, on a contract debt, which was levied on its property. An examination into the affairs of the bank, on that day, showed a deficiency in its cash account, of \$200,000, and, on the 30th of April a receiver of the bank was appointed by the Comptroller of the Currency. On the 22d of May, Colby filed a declaration in the suit. On the 1st of June, the bank was dissolved by a decree of the District Court of the United States. In March, 1869, the suit in the State Court was tried. The receiver did not make himself a party on the record to that suit, but he appeared by counsel, on the trial, and was allowed, without objection, to make proof of said facts, and to produce his appointment as receiver and the decree of dissolution. He thereupon moved the State Court to dissolve the attachment and discharge the levy and that the suit abate. The motion was overruled. The receiver then, without objection, offered the same evidence to the jury, and requested the Court to instruct them, that, if they believed the evidence, the suit could not be maintained, and they must find for the defendant. The instruction was refused, and there was a verdict for the plaintiff and a judgment for \$5,632 33 and costs. The case was then taken by appeal to the Supreme Court of Alabama, and it (46 Ala., 435,) affirmed the judgment. It is stated in the opinion of that Court, that "the record does not show that the defendant, said bank, pleaded any plea in defence of said action." A part of the judgment which was affirmed authorized the issue of a *venditioni exponas*, to sell the property levied on under the attachment. The Supreme Court of Alabama held that the insolvency of the bank did not dissolve its liability to be sued by attachment. The case was then taken by a writ of error to the Supreme Court of the United States, and is the case so reported in 21 Wallace, 609. That Court reversed the judgment and remanded the cause to the State Court, with directions to discharge the attachment levied on the property of the bank. The Supreme

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Harvey v. Allen.

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Court held that the suit in the State Court abated by the decree dissolving the bank. But it further held, that the property of a national bank, attached at the suit of an individual creditor, after the bank has become insolvent, cannot be subjected to sale for the payment of his demand, against the claim for the property, of the receiver of the bank, subsequently appointed. In the opinion of the Court, comment is made on §§ 50 and 52 of the Act of June 3d, 1864, and it is said, that they manifest a clear design, on the part of Congress, to secure the assets of the insolvent bank for ratable distribution among its general creditors, and that no preference in the application of its assets can be obtained by adversary proceedings, so as to defeat such design. It is further said, that all objection to the right of the receiver to appear in the State Court and move for the discharge of the attachment and the abatement of the suit, or to contest the case at the trial, was waived, because such right was not objected to at the time. The Court add: "But, independently of this consideration, we are of opinion, that it was a proper proceeding on the part of the receiver to apply to the Court below to discharge the attachment, on proof of the facts presented by him and the production of his appointment and the decree dissolving the injunction. Invested with the rights of the bank to the possession of the property, by his appointment, it was his duty to take the necessary steps to remove the levy. That levy was void as against his claim to the property; and, in our judgment, it was error for the Court to refuse to discharge it on his application."

In the present case, the receiver applied to the State Court to vacate the attachment, and his application was refused, on the ground that he had no *status* in the action, to make such an application. He was told that he must assert his title in some other manner. Two ways were open. One was to be made a party defendant to the suit, in place of the bank. The other was to bring this suit. He brought this suit promptly, the bill being filed five days after the order of the general term was made, affirming the order denying the

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Harvey v. Allen.

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motion to vacate the attachment. In the Colby case, the receiver was treated by the State Court and by the Supreme Court of the United States as if he were a party to the suit, and his rights as against those of the attaching creditor were adjudicated directly in the suit brought by the attaching creditor. In the present case, the receiver, before anything of substance had been done in the suit in the State Court, towards a judgment, except to issue and serve the attachment and publish the summons, filed the bill in this suit, making all parties interested defendants, setting up all the facts, and praying proper relief. The bill seeks a determination of the conflicting claims. It presents a case of equitable cognizance. On the facts set forth, the plaintiff was entitled, on final decree, to the relief prayed, except in respect of the injunctions asked for. It must be assumed, that the application for a preliminary injunction and for a receiver was refused because it was not shown that the fund was in peril, as respected the Broadway Bank, and because the Court felt itself restrained by positive statute from enjoining the proceedings of Allen, Stephens & Co. in the State Court. The answers do not set up that there is a plain, adequate and complete remedy at law. The plaintiff was not a party to the suit in the State Court. The answers do not set up the pendency of the suit in the State Court in bar of this suit. The rights of the plaintiff must be adjudicated as they stood when this suit was brought. The defendants, when served with process in this suit, were notified of the plaintiff's claim. Such process was served on Allen, Stephens & Co. and the Broadway Bank on the 22d of May, 1873. The original bill contained, in substance, the allegations found in the amended bill, except that it did not contain a prayer for an injunction against the Broadway Bank, nor any prayer for the appointment of a receiver. The amended bill prays "that the conflicting claim to said moneys, set up by the several defendants herein, may be forever foreclosed and determined by the decree herein, and that complainant may be adjudged entitled to said moneys, to the use of his said office." That

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Harvey v. Allen.

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prayer in that form is not found in the original bill. The original bill made McKim, Brothers & Co. parties, with proper averments as to their attachment, but the amended bill drops them as parties and omits such averments.

The plaintiff did not, in any manner, submit himself to the jurisdiction of the State Court, in such wise as to be bound by the judgment in the attachment suit, nor did he submit his rights to the adjudication of that Court. When he applied to that Court to vacate the attachment he was told that he had no standing to so apply, and that he must make himself a party to the suit, and submit his rights to adjudication therein, before he could be heard therein. He then came into this forum, before anything more was done in the suit in the State Court, and brought into this Court all the parties to the controversy. He took the proper step to establish his trust as respected the fund in the hands of the Broadway Bank, by coming into this Court of equity. The principle of the case of *Eyster v. Gaff*, (1 Otto, 521,) has no application to a case like the present. The attachment levy being void as against the receiver's claim to the fund, and the State Court having erroneously refused, on his application, to vacate the attachment, and having refused to adopt views such as are asserted in *National Bank v. Colby*, the receiver was under no obligation to become a party to the suit in the State Court, even though he might ultimately have the adverse judgment of the highest State Court reversed by the Supreme Court of the United States, as was done in *National Bank v. Colby*. The moment he came into this Court with the other parties to the controversy, there could no longer be any pretence that anything afterwards done in the suit in the State Court could affect his rights. From that time the defendants went on at their peril, in disposing of the fund in the Broadway Bank; and the plaintiff is entitled to an adjudication of his rights here, as of the time he brought the defendants into this Court, even though there was no preliminary injunction granted nor any receiver appointed.

It is contended, for the Broadway Bank, that, if it be held

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Harvey v. Allen.

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that the plaintiff is entitled to the relief he asks for in this suit, the Court should proceed and adjust the equities between that bank and Allen, Stephens & Co., and that such adjustment should be an adjustment of all matters contained in the pleadings and the testimony, without regard to whether such matters occurred before or after the commencement of this suit; that the proceedings which were subsequent to the commencement of this suit are set forth in the three answers, and there is no dispute about those facts; that the defendants cannot object to an adjudication being had upon facts which they themselves plead; that, at the commencement of this suit, the Broadway Bank was a mere stakeholder; that the payment to the sheriff was made under the pressure of legal process, and cannot be deemed a voluntary payment; that, if the Court should decide in favor of the plaintiff, it should decree that Allen, Stephens & Co. pay to the plaintiff the amount which the Broadway Bank paid to the sheriff, and that the Broadway Bank pay to the plaintiff the \$568 51, or, if a decree be given against the Broadway Bank for the full amount in its hands at the commencement of this suit, there should also be a decree in favor of said bank against Allen, Stephens & Co. for the \$876 94; and that the satisfaction of the judgment of Allen, Stephens & Co. against the Scandinavian Bank should be cancelled, and the plaintiff, as receiver, be ordered to pay the proper dividend on such judgment to Allen, Stephens & Co. or to the Broadway Bank, whichever may appear, according to the other provisions of the decree; to be entitled to such dividend.

On behalf of Allen, Stephens & Co. it is contended, that no decree can be made in this suit compelling Allen, Stephens & Co. to refund any part of the money which was paid to them under the judgment; that the identical money attached did not belong to the Scandinavian Bank; that the co-defendants of Allen, Stephens & Co. do not, in their answers, make any claim for affirmative relief against Allen, Stephens & Co.; that, if the Broadway Bank was merely a stakeholder, it could have gone into a Court of equity, have

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Harvey v. Allen.

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filed a bill of interpleader, have paid the money into Court, and thus have relieved itself from all liability in the matter; that, having failed to do so, it cannot now, as against Allen, Stephens & Co., and to their prejudice, claim any relief; and that the payment to the sheriff by the Broadway Bank was a voluntary payment, made without protest or objection, and, at most, under a mistake of law and not of fact.

The bill in this case sets forth a case of equitable cognizance arising out of trust. It alleges that the Comptroller of the Currency, on the insolvency of the Scandinavian Bank, and the seizure of its assets, and the protest of its circulating note, became vested in trust with such assets, for the creditors and others interested under the provisions of the Act of Congress, and as an officer of the United States, and has continued so vested and has exercised charge and trust over and in all such assets and property, and lawfully has been entitled to the actual custody and possession of the same, and, through the plaintiff, to demand and collect the same under the provisions of the Act of Congress. It sets out, that, at the time the Scandinavian Bank became insolvent, the Broadway Bank had in its possession certain assets of the former bank, namely, said moneys, which the plaintiff, as receiver, and in behalf of himself and said Comptroller was entitled to demand, and receive manual custody of, from the Broadway Bank, but the latter bank refuses to deliver the same to the plaintiff or to the Comptroller, or to make any disposition of the same that will enable the plaintiff to pay the same into the Treasury of the United States, which his duty in the premises, and a proper performance of the trusts aforesaid, requires to be done. It then sets forth, that Allen, Stephens & Co. claim a part of said funds, under their attachment. It prays that the moneys, assets of the Scandinavian Bank, in the hands of the Broadway Bank, be paid to the plaintiff, in aid of and to enforce the discharge of said trust, in behalf of himself and the said Comptroller. The attachment issued was an attachment against the property of the Scandinavian Bank. It is set up as such in the answer of

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Harvey v. Allen.

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- Allen, Stephens & Co. Although, as between the Broadway Bank and the Scandinavian Bank, the former was a debtor to the latter for the moneys on deposit, yet, before the attachment of Allen, Stephens & Co. was levied, a trust had, under the Act of Congress, become impressed upon the moneys on deposit in the Broadway Bank, and such trust remained impressed upon them at all times afterwards, and followed such of them as were paid by that bank to Allen, Stephens & Co. Allen, Stephens & Co. did not take them as *bona fide* purchasers without notice, but took them with full knowledge of all the facts and of this suit. The forms of proceeding in a Court of equity are flexible, to suit the different postures of cases. It may model the remedy, so as to suit it to controlling equities and the real and substantial rights of all the parties. It can adapt its decree to all the varieties of circumstances which may arise, and adjust it to all the peculiar rights of all the parties in interest. (1 *Story's Eq. Juris.*, § 28.) In adapting its decree to the special circumstances of a case, a Court of equity will adjust all cross equities, when all the parties in interest are before the Court, so as to prevent multiplicity of suits. (*Id.*, 437.) Allen, Stephens & Co. having taken the \$876 94 from the Broadway Bank, pending this suit, wrongfully, as against such bank and the plaintiff, without any title to it, and under a levy which was void as against the plaintiff's claim to the money, must be compelled to restore the money to the condition in which it was when this suit was brought, so that the Broadway Bank may respond for it to the plaintiff. It does not lie with Allen, Stephens & Co. to claim any advantage from their unlawful exaction from the Broadway Bank, or to complain that said bank paid the money to them and did not file a bill of interpleader and bring such money thereon into Court. All parties had been brought into this Court by this suit, and their rights placed *sub judice*, and Allen, Stephens & Co. cannot be heard to say that the Broadway Bank should have brought another suit. It is, therefore, proper that there should be a decree that Allen, Stephens & Co. respond to the

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Harvey v. Allen.

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plaintiff directly, in the first instance, for the money they received, and that the Broadway Bank should not be called upon to pay such money until there has been a failure to collect it on execution from Allen, Stephens & Co. The Broadway Bank might have brought the whole money into this Court, in this suit, before paying any part of it to Allen, Stephens & Co., and, therefore, as respects the plaintiff, who did not assent to the disposition made of the money paid to Allen, Stephens & Co., the Broadway Bank should respond to him for the money it paid to Allen, Stephens & Co., if such money cannot be collected, on execution, from Allen, Stephens & Co.

The Broadway Bank claims that it should not be charged with costs, on the ground that what money it did not pay over it retained with the assent of the plaintiff or of the Comptroller, and that the plaintiff made no demand for the money which the McKim attachment covered. Whatever assent was given before this suit was brought, to the retaining by the Broadway Bank of enough money to cover the two attachments, the bringing of this suit was a withdrawal of such assent, and was a sufficient demand for all the money. As against the plaintiff, the Broadway Bank might have brought the money into this Court, in this suit, or, knowing, as it did, of the plaintiff's claim and of the conflicting claim of Allen, Stephens & Co., it might have brought a proper proceeding of interpleader, in a proper Court, before this suit was brought. It made no effort to obtain relief from the State Court in the suit brought by Allen, Stephens & Co. It is shown, by the order filed September 18th, 1873, to have opposed the granting of an injunction against itself by this Court, from paying over the moneys to any one but the plaintiff, and to have opposed the appointment of a receiver of those moneys. It asserts, in its answer, the invalidity of the plaintiff's claim, as against that of Allen, Stephens & Co., to such moneys. Under these circumstances, it ought to pay costs to the plaintiff.

The Broadway Bank claims, that, if it is not awarded

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Harvey v. Allen.

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costs against the plaintiff, it should have costs against Allen, Stephens & Co. The Court cannot award the costs of the Broadway Bank against Allen, Stephens & Co., as that would be, in effect, a decree between co-defendants. (2 *Daniell's Ch. Pr.*, 4th Am. ed., 1406, 1407.) If the Broadway Bank had put itself in a position to be relieved from paying costs to the plaintiff, then, as Allen, Stephens & Co. have, by their conduct, occasioned this suit, the Court might deem it proper to order the plaintiff to pay costs to the Broadway Bank, and then allow him to receive such costs again from Allen, Stephens & Co. (*Id.*) But, the considerations before adverted to, on the question of costs, as between the plaintiff and the Broadway Bank, indicate that the costs of the Broadway Bank ought not to be paid by Allen, Stephens & Co.

Allen, Stephens & Co. claim that they should have costs from the plaintiff, on the ground that the plaintiff in his bill asks no relief against them except an injunction and a receiver *pendente lite*. This is a mistake. The bill asks for a perpetual injunction against Allen, Stephens & Co., both as originally filed, and as amended, from further proceeding on their attachment and from obtaining any judgment or order in their suit. This Court is inhibited from granting such relief. (*Act of March 2d, 1793, 1 U. S. Stat. at Large, 334, § 5, now § 720 of the Revised Statutes.*) But, the bill sets out the illegality of the claim of Allen, Stephens & Co., and the wrong and injury to the plaintiff by what Allen, Stephens & Co. had done, and prays for a decree determining the conflicting claims to the moneys, and for an adjudication that the plaintiff is entitled to said moneys to the use of his office, and for such other or further relief as may be proper, and for costs against all the defendants. Clearly, Allen, Stephens & Co. ought not to have costs from the plaintiff, but ought to pay costs to him.

The sheriff was a proper party to the suit, as a claimant to the money. He ought not to have costs against the successful plaintiff. Nor ought he ultimately to pay the costs of the plaintiff, yet the plaintiff ought to have the costs of mak-

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Harvey v. Allen.

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ing the sheriff a party. But, as the sheriff was merely a ministerial officer, and as the wrongful conduct of Allen, Stephens & Co. made it necessary to bring in the sheriff as a party, the proper cause is for the plaintiff to recover against Allen, Stephens & Co. his costs of making the sheriff a party, and also the costs of the sheriff's defence, the latter costs to be paid over to the sheriff by the plaintiff, when collected. Such is the practice laid down by Daniell, as above cited.

A decree will be entered establishing the plaintiff's rights, as set forth in the bill, as against the claim of Allen, Stephens & Co. and their suit and attachment and judgment, to the \$1,445 45, with interest from May 22d, 1873, the time when process on the original bill was served on the Broadway Bank. The correspondence between that bank and the Comptroller, and that bank and the receiver, relieves it from interest prior to the bringing of this suit. The decree will provide that the Broadway Bank is liable to the plaintiff for such sum and such interest; that, towards paying it, Allen, Stephens & Co. are liable to the plaintiff for \$876 94, with interest from September 20th, 1873; that execution issue against Allen, Stephens & Co. for that amount, and against the Broadway Bank for the residue; and that execution against the Broadway Bank for any amount except such residue be stayed until such execution against Allen, Stephens & Co. is returned unsatisfied, or until it otherwise appears that the plaintiff is unable to collect from Allen, Stephens & Co. the amount for which they are so decreed to be liable. In regard to costs, the decree will provide as above directed. The parties will be heard on the question as to a provision for a dividend on the claim of Allen, Stephens & Co.

*George Bliss*, for the plaintiff.

*Michael H. Cardozo*, for Allen, Stephens & Co.

*Aaron J. Vanderpoel* and *J. Sterling Smith*, for the Broadway Bank and the sheriff.

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Tift v. The Iron Clad Manufacturing Company.

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ALANSON H. TIFT

vs.

THE IRON CLAD MANUFACTURING COMPANY AND BERNARD  
REILLY, SHERIFF OF THE CITY AND COUNTY OF NEW  
YORK. IN EQUITY.

A composition in bankruptcy by T., in the District Court of the United States for the Eastern District of New York, was perfected, he having petitioned in voluntary bankruptcy. After such petition was filed, I., a creditor of T., brought a suit against him, in a State Court in the city of New York, in the Southern District of New York, to recover a debt, and levied an attachment on property of T. After that, T. was adjudicated a bankrupt. I. obtained judgment, and issued an execution, and the sheriff was about to sell the attached property. I. was bound by the composition. T. then brought a suit in equity in the Circuit Court of the United States for the Southern District of New York, against I. and the sheriff, to restrain them, and to have the levy declared void and the property restored to T., and applied for an injunction *pendente lite*: *Held*, that said Circuit Court had no jurisdiction to grant the injunction, being forbidden to do so by § 720 of the Revised Statutes of the United States.

Although the suit be one arising under the laws of the United States, within § 1 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) yet the injunction asked is not authorized by the bankrupt law to be issued by the Circuit Court, and so within the exception in § 720 of the Revised Statutes.

(Before CHOATE, J., Southern District of New York, February 19th, 1879.)

CHOATE, J. This is a motion for an injunction *pendente lite*, upon the complainant's bill. The complainant filed his petition in voluntary bankruptcy, in the Eastern District of New York, on the 11th of February, 1878, and on the same day filed his petition for a meeting of his creditors to consider a proposed composition. The first meeting in composition was held February 28th, 1878, the composition proposed was 33<sup>1</sup> per cent., for which notes were to be given, payable within eighteen months. On April 11th, 1878, the creditors accepted and confirmed the composition by the requisite major-

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Tift v. The Iron Clad Manufacturing Company.

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ity, and at a hearing before the Court on May 21st, 1878, the resolutions were confirmed and ordered to be recorded. On the 18th of April, 1878, the complainant was adjudicated a bankrupt. The Iron Clad Manufacturing Company, one of the defendants, was a creditor of the complainant, having a provable debt, and its name and address and the amount of its claim were inserted in the schedule annexed to the composition petition. On April 10th, 1878, after the filing of the petition in bankruptcy, the company commenced an action in the Marine Court of the city of New York, by attachment, against the complainant, to recover this debt, and, on the 8th of April, 1878, judgment was entered therein for \$817 92, and an execution was on the same day issued on the judgment and delivered to the sheriff. The warrant of attachment had been levied, on April 10th, on personal property of the complainant, and, on the 18th of April, the sheriff levied his execution on the same, and now threatens to sell the same under the execution, to satisfy the judgment. The bill further shows, that the loss of this property will disable the complainant from carrying into effect his composition; and the prayer of the bill is, that the levy and seizure be declared void and the property restored to the bankrupt, and that the defendants be enjoined, &c.

This motion for an injunction is resisted on the ground that the Court has no power to issue a writ of injunction in this case, to stay proceedings in a State Court, being prohibited from doing so, as it is claimed, by § 720 of the Revised Statutes, which provides as follows: "The writ of injunction shall not be granted by any Court of the United States, to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." It is not claimed on the part of the complainant that the proceeding sought to be enjoined is not a proceeding in a State Court, but it is claimed that this is a case where the injunction is authorized by a "law relating to proceedings in bankruptcy," within the

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Tift v. The Iron Clad Manufacturing Company.

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meaning of that section; and this is the question to be determined.

The jurisdiction in this case cannot be sustained on the ground of the citizenship of the parties in different States, because all the parties are residents and citizens of the State of New York. Neither can it be sustained under any provisions of the bankrupt law giving jurisdiction to the Circuit Court of the United States. Those provisions are contained in sections 4,979, 4,980 and 4,986. Section 4,979 gives jurisdiction only in cases between an assignee and a person claiming an adverse interest; and sections 4,980 and 4,986 give jurisdiction to the Circuit Court only by way of review or appeal from orders and decrees, in or arising from proceedings in bankruptcy, of the District Court of the same District. It is evident, that the Circuit Court of this District, therefore, cannot entertain this bill under either of these sections. Section 630 of the Revised Statutes, evidently referring to the jurisdiction thus given, provides as follows: "The Circuit Courts shall have jurisdiction in matters of bankruptcy, to be exercised within the limits and in the manner provided by law."

The only statute under which this bill can be maintained, and that on which the complainant's counsel rely, is section 1 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470), which provides, that "the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States." It is not questioned by the defendants' counsel that this is a suit of a civil nature, where the matter in dispute arises under the bankrupt law. The language of the Act is general—"arising under the laws of the United States." There is nothing in the other provisions of the Act indicating any purpose to except cases where the matter in dispute arises under the bankrupt law. The Court, however, in cases coming

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Tift v. The Iron Clad Manufacturing Company.

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within this Act, does not sit in bankruptcy, although the matter in dispute may arise under the bankruptcy law. It sits as a Court of common law or of equity, and section 720 of the Revised Statutes applies to all such cases. This new grant of power does not give jurisdiction of a case or proceeding in bankruptcy; and, therefore, where the relief asked for in a case under this statute is such as it is by statute exclusively within the power of a Court sitting in bankruptcy to grant, or such as it is forbidden to any Court of the United States to exercise except when sitting in bankruptcy, such relief cannot be given in a suit at law or in equity brought under this statute. Section 720 of the Revised Statutes is a re-enactment of the Act of March 2d, 1793, (1 *U. S. Stat. at Large*, 334,) as modified by the provisions of the bankrupt law of 1867. Prior to the passage of the bankrupt law, the Courts of the United States were prohibited from issuing any injunction to stay proceedings in a State Court. But, the 21st section of the bankrupt law (14 *U. S. Stat. at Large*, 526,) re-enacted in section 5,106 of the Revised Statutes, provided, that "no creditor whose debt is provable under this Act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceeding shall, upon the application of the bankrupt, be stayed, to await the determination of the Court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that, if the amount due the creditor is in dispute, the suit, by leave of the Court in bankruptcy, may proceed to judgment, for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed." Upon the revision of the statutes the power to issue the writ of injunction, necessarily implied in this section, was provided for in the re-enactment of the prohibitory statute of 1793, by introducing the words, "except in cases where such injunction may be authorized by

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Tift v. The Iron Clad Manufacturing Company.

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any law relating to proceedings in bankruptcy." It is argued, on behalf of the complainant, that this is to be construed as meaning "under circumstances," or "upon a state of facts," where, by a law relating to bankruptcy, the stay by injunction is authorized; that the present is such a case; that, the Act of 1875 having given the Circuit Court jurisdiction without regard to the citizenship of the parties, in suits in equity where the matter in dispute arises under the bankrupt law, the intention was to give the Court full equity powers in such cases; and that the Court can issue the injunction, because, upon the facts shown, the case is one in which a stay is allowed under the bankrupt law. There would be great force in the argument, if the power given in the bankrupt law were a general enactment authorizing a stay of suits in State Courts, without anything to indicate that the power thus given was exclusively conferred on the District Court sitting in bankruptcy. The section in question, however, (5,106) in so far as it authorizes the issue of an injunction, has been held to be peculiarly addressed to the District Court sitting in bankruptcy. (*In re Rosenberg*, 3 *Benedict*, 14, 18.) In that case, Judge Blatchford says, that the stay provided for is to be, and is, in practice, granted by the bankruptcy Court. It is evidently one of those "things to be done under and in virtue of the bankruptcy," which, by § 4,972, are exclusively committed to the bankrupt Court, so far as they are committed to a Court of the United States; and section 5,106 contains in itself enough to show the same purpose. Therefore, the argument for the complainant fails because this is not *the case* mentioned in the exception, the laws relating to bankruptcy having expressly limited the power to issue the injunction not only to certain circumstances which may exist here, but to a Court and a proceeding other than the present. The complainant's case is one which appeals very strongly to the Court for the exercise of any powers which it is able to exercise for his relief, since this creditor is proceeding to obtain an advantage over other creditors, in direct violation of the composition agreement

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The First Nat. Bank of North Bennington v. The Town of Bennington.

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by which it is bound, but it cannot have an injunction in this suit. Perhaps the complainant can be relieved in the District Court for this District, under its power as a Court of bankruptcy, ancillary to the jurisdiction of the District Court for the District where the original petition was filed. (See *Sherman v. Bingham*, 3 *Clifford*, 552; *Lathrop v. Drake*, 1 *Otto*, 516.)

The motion is denied.

*Albert C. Aubrey and Louis Henry*, for the plaintiff.

*Charles H. Phelps and Henry E. Davies*, for the defendants.

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THE FIRST NATIONAL BANK OF NORTH BENNINGTON

vs.

THE TOWN OF BENNINGTON.

A town in Vermont issued bonds under seal, in aid of a railroad, with interest coupons attached, not under seal. Each coupon contained an express promise by the town to pay, and was payable to bearer, and was signed by the proper officer: *Held*, that assumpsit was a proper form of action on the coupons.

The statute of the State of Vermont, under which the bonds were issued, having been held to be valid under the Constitution of the State, by the highest Court of Vermont, this Court followed such decision.

A national bank has, under § 5,136 of the Revised Statutes of the United States, authority to take and hold and sue upon such coupons.

(Before WHEELER, J., Vermont, February 25th, 1879.)

WHEELER, J. This is a motion for a new trial, in an action of assumpsit upon coupons from the bonds of the defend-

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The First Nat. Bank of North Bennington v. The Town of Bennington.

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ant, issued in aid of the Lebanon Springs Railroad Company, a corporation existing under the laws of New York, under No. 1 of the special session laws of Vermont, 1867, after a verdict for the plaintiff, directed by the Court, at last term.

The grounds urged in support of the motion are, that, upon the evidence in the case, the action cannot be maintained, because the bonds are under seal, and, therefore, assumpsit is not the proper form of action; that the statute under which the bonds were issued is contrary to the Constitution of the State; and that the plaintiff is without authority under the law to take and hold such instruments and maintain any action upon them.

The statute authorized the issuing bonds or notes, with interest coupons attached, the bonds to be signed by the selectmen, and the coupons by the treasurer, of the towns. The bonds are under seal; the coupons are signed as the statute requires, and are not under seal. Each coupon contains an express promise to pay. It reads: "The town of Bennington will pay to the bearer," &c. It was intended to be separated from the bond, and to be evidence in itself of a debt, and to be paid and taken up as such. It is a negotiable instrument, and, if valid, constitutes a cause of action in the hands of any holder. (*Knox Co. v. Aspinwall*, 21 How., 539; *Knox Co. v. Wallace*, *Id.*, 546.) Therefore, a judgment upon one coupon, or a set of coupons, from a bond, is not conclusive between the same parties, or their privies, for or against the validity of other coupons from the same bond, unless the validity of all of them was tried and determined. (*Cromwell v. County of Sac*, 94 U. S., 351.) When a coupon is sued, an appropriate action to recover upon it, according to its nature, must be brought. These coupons are, in their nature, simple contracts, and assumpsit, although not the only remedy, for, debt would lie, is a proper remedy. It was maintained upon similar coupons in *Aurora v. West*, (7 Wall., 82.)

All questions as to the validity of the statute under which the bonds and coupons were issued arise under the Constitution of the State, and not at all under that, or any law, of the

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The First Nat. Bank of North Bennington v. The Town of Bennington.

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United States. There is no Federal question involved. This Court has jurisdiction because the plaintiff has been organized as a corporation, and exists, under the laws of the United States, and those laws have given jurisdiction of suits by and against it. (*Rev. Stat. U. S., sec. 629, Fenth.*) This jurisdiction is concurrent with, and, although independent of, not over, that of the State Courts. The laws of the States, under the Constitutions of the States, when they do not conflict with the Constitution or the laws of the United States, are wholly matters of State concern and subject to State control. Of necessity, the construction given by the highest Court of a State, constituted for that purpose, to the Constitution and laws of the State, must stand as a part of them. A State would not be sovereign and independent as to a Constitution and laws which it could not, by its own appointed tribunals, construe, any more than it would be if it could not adopt or enact them. This right of the States to have their Courts of last resort construe their laws, both legislative and organic, has always been conceded. (*Gelpcke v. Dubuque*, 1 Wall., 175.) There never appears to have been any question about the right, nor any about following the decisions, unless they were fluctuating. And the decision of the highest tribunal of a State, maintaining the validity of a statute, under the Constitution of the State, is always followed. (*Pennsylvania College Cases*, 13 Wall., 190; *Atlantic & Gulf R. R. Co. v. Georgia*, 98 U. S., 359; *County of Henry v. Nicolay*, 95 U. S., 619.) The question as to the validity of this statute, under the Constitution of the State, has been before, and been determined by, the highest judicial tribunal of the State, and at a general term of the highest Court, when all the judges sit together for the consideration of important questions, thus constituting it not only the highest in name, but also in ability, that can be had in the State. It would not be decorous toward, nor in accordance with the great respect entertained for, that Court, to examine the grounds of its decision, or do more than ascertain what it was, especially if in favor of the validity of the law. And it was so. (*Bennington v. Park*,

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The First Nat. Bank of North Bennington v. The Town of Bennington.

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50 *Vt.*, 178; *Bank v. Concord, Id.*, 257.) The defendant has no rights in this behalf, except those which the tribunals of its own State, under whose laws it exists, would accord to it. The plaintiff had the right to invoke the aid of the Courts of either jurisdiction, but there the right of choice ended, as to both parties. The rule for determination must be the same in each.

The statute (*Rev. Stat. U. S.*, sec. 5,136, *Seventh*,) authorizes national banks, of which the plaintiff is one, to exercise all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, &c. These coupons are doubtless promissory notes, within the statute 3 and 4 *Anne*, ch. 9, and of this statute, both of which use the term in the same sense, unquestionably. They are also evidences of debt. The coupons, and the right to sue upon them, are all that are now in question. No intimation of any views concerning the right to take and hold the bonds is intended by this discrimination, however.

The motion is overruled, and judgment entered on the verdict.

• *Edward J. Phelps* and *George W. Harman*, for the plaintiff.

*Charles N. Davenport*, *Tarrant Sibley* and *A. B. Gardner*, for the defendant.

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The First Nat. Bank of North Bennington v. The Town of Arlington.

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THE FIRST NATIONAL BANK OF NORTH BENNINGTON

v8.

THE TOWN OF ARLINGTON.

In an action against a town in Vermont, on coupons from bonds issued by it in aid of a railroad, it appeared that the bonds were signed by only two of the selectmen of the town, although there were three in office at the time, the statute requiring the bonds to be signed by the selectmen. The highest Court of Vermont having held that, under the General Statutes of Vermont, (*title 2, chap. 4, sec. 2.*) a majority of the selectmen had as full authority as a full board to issue such bonds under such a statute, this Court followed that decision.

A provision in the statute, that the bonds should be registered in the office of the town clerk, was held to be directory merely, and a want of compliance with such provision was held not to affect the validity of the bonds.

Evidence excluded of declarations made to tax payers before they assented to the issuing of the bonds, which induced them to assent.

(Before WHEELER, J., Vermont, February 25th, 1879.)

WHEELER, J. This is a motion for a new trial, in an action of assumpsit upon coupons from bonds of the defendant, after a verdict for the plaintiff at the last term, heard at the same time with the motion in *First Nat. Bank of No. Bennington v. Bennington*, (*ante*, p. 53.) All the reasons urged in behalf of the motion in that case have been urged in this, and are disposed of here upon the same grounds, in the same way. In addition, it is insisted, that the motion should be granted, because but two of the selectmen of the defendant signed these bonds, although there were three in office at that time; because the bonds were not registered in the town clerk's office; and because the defendant's offer to prove, that, before the assent of the tax payers was executed, Mr. Park, to whom the bonds were delivered, as director of the Lebanon Springs Railroad Company, and who was president of the plaintiff, addressed a public meeting of the tax payers,

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The First Nat. Bank of North Bennington v. The Town of Arlington.

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and said, that, if they did not assent, he should tear up the track of the Bennington and Rutland Railroad, which ran through the town, and in which he had a controlling interest, and they had heard the last whistle, which induced some to assent, was excluded.

In the General Statutes of the State, it was and is provided, in respect to the construction of statutes, that, "all words purporting to give a joint authority to three or more public officers or other persons, shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority." (*Title 2, chap. 4, sect. 2.*) This has been construed, by the highest Court of the State, as giving as full authority to a majority of the selectmen as the full board would have, to issue bonds like these, under a like statute. (*Bank v. Concord*, 50 *Vt.*, 257.) That construction is sufficient for and binding upon this Court, as if it was a part of the statute itself, even if there would be any fair question about it otherwise. (*Gelpcke v. Dubuque*, 1 *Wall.*, 175; *Leffingwell v. Warren*, 2 *Black*, 599.)

By this Act, No. 1 of the special session laws of Vermont, 1867, these towns were authorized and empowered to subscribe for, purchase and acquire, upon the conditions in the Act specified, the bonds of the Lebanon Springs Railroad Company. The conditions specified were, that no such subscription, purchase or contract should be made, unless the assent in writing thereto of a majority of the tax payers, both in number and amount of tax, should be obtained, to be certified to by the commissioners named in the assent, of which fact the law further provided that their certificate should be conclusive evidence. In this case, the purchase of the bonds of the Lebanon Springs Railroad Company was assented to by the requisite majority of the tax payers, as shown by the certificate of the commissioners, and the purchase was made. The purchase of these bonds was within the scope of the corporate powers of the town, as enlarged by the Act, and the bonds became the corporate property of the town, which the

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The First Nat. Bank of North Bennington v. The Town of Arlington.

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town was holden to pay for. The bonds of the town in question were issued and delivered in payment for those railroad bonds. So, they were executed and delivered upon a sufficient consideration, if any was required, and however valueless the railroad bonds ultimately turned out to be, and in satisfaction of a debt which the town had become bound to provide for. And the selectmen may have had power, under the provision of the General Statutes of the State which gives them authority to "audit, and, in their discretion, allow, the claim of any person against the town, for money paid or services performed for the town," and to draw orders on the treasurer for the sum so allowed, to allow and draw orders for this debt. (*Title 9, chap. 15, sect. 52.*) The powers of the selectmen, under this section, are held to be very broad. (*Dix v. Dummerston*, 19 *Vt.*, 262; *Hollister v. Pawlet*, 43 *Vt.*, 425; *Cabot v. Britt*, 36 *Vt.*, 349; *Burton v. Norwich*, 34 *Vt.*, 345.) Still, the selectmen would not have power, under that general statute, to issue these bonds, and much more would the treasurer lack power, under any general provision, to issue the coupons. The nature and effect of these instruments is quite different from any they could find any color for executing. So, the authority to issue them must be looked for only in this special Act, and, when found, it could be exercised only in the mode provided by the Act. The Act, (*sec. 4.*) after authorizing the making and issuing the bonds by the towns, with coupons, for the purpose of making any purchase or fulfilling any subscription or contract authorized by the Act, or of raising money so to do, provides: "which said bonds or notes shall be signed by the selectmen, and countersigned by the treasurer, of the town issuing the same, and shall be dated, numbered and registered in the town clerk's office of such town. And said coupons shall be signed by said treasurer. And said notes or bonds so made and issued shall create a valid obligation against such town, according to their tenor." This registry of the bonds would not mean a record of them at large, as the word used in other connections and places might indicate, but here, as

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The First Nat. Bank of North Bennington v. The Town of Arlington.

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used in connection with the requirement that the bonds should be numbered and dated, would seem to mean that the number and date of the bonds, with the amount, probably, should be entered of record in the town clerk's office. The object, doubtless, was to afford a place where all interested could ascertain readily the particulars of such bonds. There is no provision requiring the entry of the fact of registry upon the bonds, nor expressly pointing out who should procure the registry to be made. Nor is there any providing that they shall not be binding until registered. As to that, the provision is, that they shall create a valid obligation when "so made and issued." The registration would be no part of making the bonds, for it would have nothing to do with their structure. It would be *making* the record in the clerk's office. It would have nothing to do with issuing them, literally, for that would be sending them out, putting them into circulation, or delivering them from authority. So, the registration is not any part of what the law requires to make them binding, unless it is impliedly brought in for that purpose from usage, or in some other mode. The law of the State requires the selectmen of towns to keep a record of all accounts by them allowed, and of all orders drawn on the treasury, under the provisions authorizing them to draw orders. (*Gen..Stat., title 9, chap. 15, sect. 53.*) Still, it has never been heard to be claimed or thought, that their failure to keep such records would in any manner affect the orders drawn, or their validity. A statute of Kansas required that such bonds should be registered in the municipality issuing them, and in the office of the Auditor of State, who was required to certify thereon, among other things, that they had been registered in his office according to law, and provided that they should not bear interest or be negotiable until after delivery and registration thereof. In *Township of Rock Creek v. Strong*, (96 U. S., 271,) the action below was on bonds of the township issued under this statute, in favor of a purchaser, and the defendant offered to show that they had never been registered in the office of the Auditor of State,

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The First Nat. Bank of North Bennington v. The Town of Arlington.

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although his certificate that they had been so registered was endorsed upon them. The Auditor of State was not an officer nor an agent of the township, and his certificate could not estop the township from showing the fact. The purpose of the registration must have been the same as of that provided for of these bonds. And it would more clearly appear to be a part of the transaction of issuing them, for, they were not, by the law, to bear interest, or be negotiable, until it had been done. Still, the Court below, in that case, excluded the evidence, and the decision was affirmed in the Supreme Court. As the law there required a certificate of the registration to be endorsed upon the bonds and the law here did not, the bonds here, without such endorsement, would stand the same as those there would with it, when there was no registration in fact in either case. The requirement of registration seems to be directory merely, and want of compliance was not made by the terms of the Act, and cannot justly be held, to affect the validity of the bonds themselves.

If Mr. Park did say what the defendant offered to prove he said, and it had the effect offered to be shown, there was no accompanying offer to show it was not true, not but that it was said in good faith, in the course of legitimate discussion. Hence, it could not affect the bonds, even if the plaintiff is so situated as to be affected the same as Mr. Park would be.

The motion is overruled and judgment is entered on the verdict.

*Edward J. Phelps* and *George W. Harman*, for the plaintiff.

*Charles N. Davenport* and *James K. Batchelder*, for the defendant.

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The First Nat. Bank of North Bennington v. The Town of Dorset.

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THE FIRST NATIONAL BANK OF NORTH BENNINGTON

vs.

THE TOWN OF DORSET.

After a majority of the tax payers of a town in Vermont had assented in writing to the issuing of bonds by the town in aid of a railroad, and before the commissioners had certified to that fact, enough of the tax payers to destroy the majority executed in writing a withdrawal of their assent and sent it to the commissioners, without going before them in person. The statute made no provision for dissent after assent. The commissioners disregarded the withdrawal and made the certificate: *Held*, that such withdrawal did not affect the validity of the bonds and that the decision of the commissioners was final.

(Before WHEELER, J., Vermont, February 25th, 1879.)

WHEELER, J. This is a motion for a new trial, after a verdict for the plaintiff at the last term, and involves no question not involved either in *First National Bank of North Bennington v. Bennington*, (*ante*, p. 53,) or in *The same v. Arlington*, (*ante*, p. 57,) heard at the same time with this, except that in this it appears, that, after the required majority, or what the commissioners found to be such majority, had assented in writing, executed as required, and before the commissioners had certified to that fact, some forty of the tax payers executed, in the same manner that the assent was executed, what they called a recantation, notwithstanding their assent, which was shown to, and a copy of it taken by, the commissioners. The withdrawal of this number would leave the number assenting clearly below a majority. It is urged, that, after this, the commissioners had no authority to proceed with making the certificate, and that it was void, and that this would invalidate the bonds.

The provisions of the Act, affecting this question, are, that no subscription, purchase or contract shall be made, "unless the assent in writing thereto of a majority of the tax payers

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The First Nat. Bank of North Bennington v. The Town of Dorset.

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\* \* shall be obtained," and that, when obtained, the person named in the assent for commissioners shall be commissioners, who shall append their certificate that a majority have assented, and that any contract made by such commissioners in pursuance of the terms of the assent, and not inconsistent therewith, shall be binding upon the town. There is no provision for any dissent after assent by any person, or for any mode of making such dissent known to the commissioners, if it should arise.

This method of obtaining an expression of the sense and will of the tax payers is treated by the Supreme Court of the State, in *Bennington v. Park*, (50 *Vt.*, 178,) and *Bank v. Concord, Id.*, 257,) as a mode of voting, in which all those assenting vote for, and all those not assenting vote against, the proposition in the instrument of assent. In that view, when a tax payer had executed the instrument of assent, he had exercised his right of voting and voted on that question. In all deliberative assemblies, each member has the right to change his vote upon any question, at any time before the vote is declared. Perhaps the voters, in this mode of voting, would have the same right at any time before the result should be certified to by the commissioners. They would probably have it, unless the provisions for this method of voting have cut it off. Perhaps the Legislature intended, by not providing any mode for changing any votes, that it should be cut off. But, if not, and the right was left, it could only be exercised in some proper mode. None of the dissenters went in person to the commissioners and made known their wish, or claimed any right to dissent. They merely executed an instrument in writing expressing their dissent, and sent that. If a voter in town meeting, or a member of a Legislature, should, in absence, after voting on any question, and before the result of the vote should be declared, send, in writing, a change of his vote, probably no notice would be taken of it, however formal and solemn the execution of it might be. He would be required to be personally present, or compelled to leave the subject to stand, so far as he should be concerned,

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The First Nat. Bank of North Bennington v. The Town of Dorset.

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as it was when he was present. (*State v. Tudor*, 5 Day, 329.) In that case, Ingersoll, J., said: "I agree most fully, that, by the common law, every vote given in a corporation instituted for the public good, either the good of the whole State, or of a particular town or society, must be personally given. So, also, every vote given by a freeman for his representative, must be given by him in person. There is no deviation from this rule; the authorities on this subject are uniform." Even the right to vote by proxy in private corporations is not a general right, and authority for it must be shown by some law or by-law made pursuant to law. (*Angell & Ames on Corp.*, § 130.) Perhaps, if those desiring to dissent had gone personally to the commissioners, and claimed the right to withdraw their assent, and to take their names or have them taken from the assent, the commissioners would have been bound to heed them, and perhaps not; but, if they would, nothing of the kind was done, nor anything that would be an equivalent for it in fact, and nothing was provided by law that should, in law, be an equivalent. What they sent was, in its nature, mere hearsay. It was authenticated the same as the assent, but the law made the assent so authenticated equal to a vote, and did not make a withdrawal so authenticated equal to a change of vote. There was no law requiring the commissioners to regard, or authorizing them to act upon, the recantation.

Further than this, the law made the decision of the commissioners final; and the Supreme Court of the State has construed this law as making it final for all purposes, where others are concerned, however erroneously they may have acted in making it. (*Aldis v. Lamoille Valley Railroad Co.*, cited 50 Vt., 281.) And, still further, if there was misconduct, or fraud even, of these commissioners, as their recorded proceedings were regular on their face, it would not affect the rights of a *bona fide* holder of the bonds. (*East Lincoln v. Davenport*, 94 U. S., 801.)

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The United States v. Moller.

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The motion is overruled and judgment entered on the verdict.

*Edward J. Phelps* and *George W. Harman*, for the plaintiff.

*Charles N. Davenport* and *Tarrant Sibley*, for the defendant.

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THE UNITED STATES vs. ANTON MOLLER.

It is not necessary that a criminal information should show either that the defendant has been held to answer the charge, on a complaint before a Commissioner, or that the charge has been found true by a grand jury.

A criminal information for a violation of section 5,445 of the Revised Statutes of the United States, in effecting an entry of merchandise, need not set forth the various steps or documents by which the entry was accomplished, so long as the information is otherwise sufficient.

The question whether a criminal prosecution for the acts complained of will lie after the recovery of a penalty by a civil suit for the same acts, does not arise on a demurrer to the information.

(Before BENEDICT, J., Southern District of New York, February 28th, 1879.)

BENEDICT, J. This case comes before the Court upon a demurrer to the information. It is first contended, in support of the demurrer, that the proceeding by information will not lie, because it does not appear on the face of the information, either that a complaint had been laid before a Commissioner, and the defendant thereupon held to answer to the charge set forth in the information, or that the charge had ever been found true by a grand jury. Although it has been the practice in this District, where it is intended to proceed by information, to make a preliminary complaint before a Commissioner—a practice which I certainly do not intend

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The United States v. Moller.

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to discountenance—I know of no practice or rule that requires the information to show on its face that such a course has been pursued. In the absence of any such requirement, the question of the right to proceed by information, without a preliminary hearing before a Commissioner, is not raised by a demurrer.

The next objection presented is, that certain documents, by means of which, it is charged, the offence was committed, are not set out by their tenor. In support of this objection, authorities are cited, to the effect, that, when written instruments enter into the gist of the offence, they should be set out in words and figures. But, written instruments do not enter into the gist of the offence charged in this information. The offence charged is that created by section 5,445 of the Revised Statutes, which provides, that “every person who, by any means whatever, knowingly effects, or aids in effecting, any entry of any goods, wares or merchandise, at less than the true weight or measure thereof, or upon a false classification thereof as to quality or value, or by the payment of less than the amount of duty legally due thereon, shall be fined, &c.” The statute, it will be observed, says, “by any means whatever,” clearly showing that the means employed to effect an entry of goods upon a false classification as to value, or by payment of less than the legal duty, are not of the essence of the crime. The gist of the offence consists in the fraudulent entry, and it is unnecessary to set forth in an information the various steps whereby the entry was accomplished. The information charges, that the defendant, at a certain time and place, effected an entry of certain goods, so described as to identify the goods as well as the entry thereof; and to show that by law the goods were subject to a duty of 60 *per cent. ad valorem*, coupled with the averment that they were liable to that rate of duty. It is then stated that said goods were entered by the defendant upon a false classification as to value, and the particular in which the classification was false is stated. It is also charged that such entry was effected by a payment of less than the legal duty, and the

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The United States v. Moller.

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amount of the duty paid and the amount of duty legally due are stated. These averments contain every ingredient of the offence, and constitute a statement of the acts alleged to have been done, with sufficient particularity to inform the defendant in regard to the charge, and to show to the Court that an offence has been committed. The other averments of the information, undertaking to describe, with more or less certainty, the means employed by the defendant to effect the said entry, were unnecessary, and, being unnecessary, any defect therein will not invalidate the information.

The remaining point made is, that the information will not lie because of the recovery of a penalty by civil suit based on the same acts here complained of. Clearly, this question does not arise upon demurrer, and it cannot, therefore, be now determined.

There must be judgment for the prosecution, on the demurrer, with leave to the defendant to plead.

*William P. Fiero, (Assistant District Attorney,) for the United States.*

*Benajmin B. Foster, for the defendant.*

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The United Nickel Company v. The Manhattan Brass Company.

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THE UNITED NICKEL COMPANY

v8.

THE MANHATTAN BRASS COMPANY AND OTHERS. IN EQUITY.

THE SAME

v8.

WILLIAM H. JACKSON AND OTHERS. IN EQUITY.

The decision in *United Nickel Co. v. Harris*, (15 *Blatchf. C. C. R.*, 319,) sustaining the validity of the letters patent granted to Isaac Adams, Jr., August 3d, 1869, for an "improvement in the electro-deposition of nickel," reviewed and confirmed.

The said patent is infringed, although the salts of potash and soda are introduced into the solution, provided the solution is not so used as to liberate free potash or free soda.

(Before BLATCHFORD, J., Southern District of New York, March 11th, 1879.)

BLATCHFORD, J. It is set forth, in the moving affidavits, that the defendants in these suits united with various other nickel platers, in the defence of the suit brought by the plaintiffs, in this Court, against Harris and Weston, (15 *Blatchf. C. C. R.*, 319,) and contributed to the expenses, and have, in these suits, employed the same counsel, and made substantially the same defences and answers, as in said suit against Harris and Weston. There is no denial of these allegations.

It is also set forth, in the moving affidavits, that the step nickel plated by the defendants in the first suit, and the grate crown nickel plated by the defendants in the second suit, are plated each with a coherent, compact and tenacious coating of nickel; that said step and said grate crown have each been plated by a process described in the Adams patent

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The United Nickel Company v. The Manhattan Brass Company.

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of August 3d, 1869, and could have been plated by no other process ; and that no practical nickel plating can be done, unless the process described in said patent is followed, or some material or substantial part thereof. Professor Chandler sets forth, that he has examined said step and said grate crown ; that, in his opinion, the coating on each of them is a coating of compact, coherent, tenacious and flexible nickel, of sufficient thickness to protect the metal on which the deposit is made from the action of corrosive agents with which said articles may be brought in contact ; that, without knowing exactly the composition of the solution in which each article has been nickel plated, he is very confident that it has been nickel plated in a solution which, in use, is free from the presence of potash, soda, alumina, lime or nitric acid, or from any acid or alkaline reaction ; and, that the solution was a double sulphate of nickel and ammonia, or a double chloride of nickel and ammonium, or a mixture of the two, that is, the solution which was used by the defendants in said suit against Harris and Weston. Professor Morton makes an affidavit to the same effect. These affidavits are not contradicted. If the articles in question were not nickel plated in a solution and by a process such as stated, the defendants, knowing the facts, and having the means of stating them, have not set forth to the contrary, or by what solution or process the articles were plated.

The step and the grate crown were so nickel plated in January, 1878. The defendants produce affidavits to show, that, in November, 1878, they each used, in nickel plating, a solution which did not contain any ammonia, or any of the compounds of ammonia, and was not a solution of the double sulphate of nickel and ammonia, or a solution of the double chloride of nickel and ammonium, and was not a mixture of said two solutions, and was not the same solution as, nor a similar solution to, the solution which was decided, in the suit against Harris and Weston, to be an infringement of the said Adams patent, and is not an infringement on said patent. The affidavits swear to the above conclusions and deductions, in the

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The United Nickel Company v. The Manhattan Brass Company.

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above language, but no where set forth what was the chemical composition of the solutions of November, 1878, although it is set forth that analyses of them were made on which such conclusions and deductions are based. The nickel plating done by said solutions of November, 1878, is set forth, in one case, to have been "a perfectly uniform, coherent and beautifully colored coating of nickel," and "a tenacious, coherent and flexible coating of nickel, amply sufficient in thickness to protect the surfaces" of the objects which were nickel plated in it, "from exposure to the air," and, in the other case, to have been "a coating of compact, coherent, tenacious and flexible nickel," and "a perfectly uniform, coherent and beautifully colored coating of nickel." It is not shown, by the defendants, that the step or the grate crown complained of was plated in a solution made like that of November, 1878. We are not trying, in these cases, the solutions of November, 1878, or the articles plated in them, nor have the plaintiffs had any opportunity to produce evidence as to such solutions or articles. We are concerned now only with the step and the grate crown, and the solutions and processes by which they were plated.

The opposition to the motions for injunctions in these cases is based upon the affidavits of four chemical experts, Professor Seeley, Mr. Weston, Professor Doremus and Dr. Antisell. Professor Seeley was an expert for the defendants in the suit against Harris and Weston. Mr. Weston was one of the defendants, and also a witness, in that suit, and the other two gentlemen were not witnesses in that suit. The object of these affidavits is to establish that this Court reached an erroneous conclusion in the suit against Harris and Weston, and that it ought now to reverse that conclusion. I have read these affidavits with care, and have re-examined the testimony in the suit against Harris and Weston, and have considered with attention the argument of the eminent counsel for the defendants, both as orally delivered and since in print, and am unable to see that anything now advanced was not presented in evidence and argument in the suit

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The United Nickel Company v. The Manhattan Brass Company.

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against Harris and Weston, or that the judgment rendered in that case did not advert to all the points now urged for the defence.

Professor Seeley testifies, that he has served as expert on the part of the defence in seven suits brought by the United Nickel Company on the Adams patent of 1869; that the defence in the suit against Harris and Weston was intended to be complete and exhaustive; that every theory of the construction of the first claim of the patent, which had any color of plausibility, was carefully scrutinized and tested; that the relation of caustic potash, &c., to the solution, and the theory of Professor Babcock, came under an investigation which employed the best resources of practical experiments and scientific knowledge on the part of the defence; and that the conclusion arrived at was, that the first claim of the patent could not be interpreted to mean or imply that the substances therein named were in a free or caustic state. Professor Seeley states Professor Babcock's theory to be, not only that the words, potash, &c., of the first claim are used to indicate those substances in a free or caustic state, but that those substances are eliminated, developed or produced in the solution during the operation of electro-deposition; and that such theory considers the salts of potash *per se* not injurious, but that, being in the plating solution when they are under the influence of the electric current, their bases are set free, and such bases are then present and become actively injurious. In opposition to such theory, Professor Seeley states, that free or caustic potash and soda cannot possibly, in any circumstances whatever, for a moment exist in a solution either of salts of ammonia or salts of nickel, or in a solution of the double salts mentioned in the claim of the patent; and that potash and soda, in contact with the solution of the double salts, instantly and completely go out of existence as caustic potash and caustic soda.

Dr. Antisell states, that no injurious consequences arise from any possible presence of basic elements, such as potash, soda, &c., since those elements, if so produced, cannot exist

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The United Nickel Company v. The Manhattan Brass Company.

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but for a moment, and are at once converted into sulphates of those alkalies, by robbing the sulphate of ammonia of its acid.

Professor Doremus states, that free, basic or caustic potash, soda or lime, when introduced into a solution of the double sulphate of nickel and ammonia, or when produced at the negative pole by the electric current, will instantly combine with the sulphuric acid, and form therewith sulphates of potash, soda or lime; and that the same is true in regard to those substances and a solution of the double chloride of nickel and ammonium, chlorides of potassium, sodium or calcium being instantly formed.

Mr. Weston's affidavit is to the same effect as the affidavits of the other three gentlemen.

The gist of the argument on the part of the defence, based on these affidavits, is, that, if the first claim of the patent is for the exclusion of sulphates and chlorides, it has not been infringed, because the sulphate of potash and the chloride of soda are freely introduced into the solution used by the defendants; and that, if such claim is for the exclusion of free or basic or caustic potash or soda, it is a claim to the exclusion of what cannot, under the laws of chemistry, exist in the solution. But, the views urged in the affidavits of the experts for the defendants, and in the argument of their counsel, do not meet the case as established by the evidence taken in the suit against Harris and Weston. That case is this: The salts of potash and soda, in the solution, are harmless, under certain conditions. Under certain other conditions they are injurious. If the concentration of the solution, its resistance, the strength of the current, and, perhaps, other matters, are not carefully adapted to the presence of such salts, the effect of the current will be to decompose those salts and liberate, for the moment, the potash or the soda. Potash, when so produced or liberated in the solution, causes a precipitation of the oxide of nickel, which attaches itself to the article that is being plated, and affects the adhesion and character of the nickel deposit, and also its color. The same thing is true of

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The United Nickel Company v. The Manhattan Brass Company.

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soda and its salt. The patentee, in his specification, sets forth, with great distinctness, that potash and soda are injurious, and will prevent the result of obtaining a coating of compact, tenacious, flexible nickel, of adequate thickness. The precipitation of the oxide of nickel is injurious, and prevents such result. The production of potash or soda in the solution, in such wise as to cause the precipitation of the oxide of nickel, leads to such injurious effect. Potash or soda may be produced in the solution, if the salts of potash or soda are introduced into the solution, unless such care is taken as to the surrounding conditions, that such salts are not decomposed. The patentee points out the fact, that the solution must be so used as to be free from the presence of potash or soda. The salts of potash and soda are not potash and soda, and, unless decomposed, so as to liberate potash and soda, produce no injurious effect. When it is shown that the liberation and consequent presence, but for a minute space of time, of potash and soda, but sufficiently long to produce a precipitation of the oxide of nickel, result from the decomposition of the salts of potash and soda, and produce the injurious consequence referred to, and when it is also shown that those salts, though present, produce no such injury, if not decomposed, it requires very strong evidence to arrive at the conclusion that the patentee, in saying that the solution must be so used as to be free from the presence of potash or soda, meant that it must be so used as to be free from the substances that are not injurious and not free from the substances that are injurious. Yet that is what the Court is asked to say. The evidence, instead of being to that effect, is decidedly the other way. The language and proper interpretation of the specification were fully considered in the decision rendered in the case against Harris and Weston, and nothing has been presented to cause any change in the views there expressed. On the contrary, the case on the part of the plaintiffs is fortified by the affidavits of Professor Henry Morton and Professor Charles F. Chandler, chemists of eminence, who were not witnesses in the suit against Harris and

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The United Nickel Company v. The Manhattan Brass Company.

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Weston. Professor Morton says: "I have examined into the state of the art of nickel plating prior to August, 1869, at which time certain letters patent were granted to Isaac Adams, Junior, for improvements in electro-deposition of nickel. I have read said letters patent, bearing date August 3d, 1869, and believe that I understand the same, the processes therein described, and the precautions therein given. From my knowledge of the state of the art prior to the publication of said letters patent, there was nothing in any book or journal that would have given such instruction to one familiar with the processes in use for electroplating with other metals, as would enable him to successfully practice the art of nickel plating, and I believe that the matter set forth in the above mentioned letters patent first gave to the world a process by which electroplating with nickel could be practiced as an art. The conditions under which metals may be successfully deposited from their solutions by means of an electro-current, vary greatly with different metals, so that what would be favorable for one metal may be fatal to success with another; and there is no evidence, that, at the date of the Adams patent, anything whatever was known of the particular conditions which are essential to success where nickel is employed. It was well known that nickel could be deposited by the battery, and, in a few instances, good deposits had actually been obtained, but, though it had been stated that a deposit of nickel upon various articles by means of the galvanic current would be very valuable if it could be practically carried on in the arts, yet no such practical electroplating with nickel had ever been carried on. Repeated attempts had only resulted in as many failures, and the conditions necessary to the successful prosecution of this art had never been made public, nor, as I believe, were they known. I have read all the quotations offered as exhibits in the suit of these complainants against George J. Harris and Edward Weston, having reference to the electro-deposition of nickel, published prior to August 3d, 1869, and have given especial attention to the quotation from Muspratt-Stohman's 'Chemie,

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The United Nickel Company v. The Manhattan Brass Company.

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Theoretische, Praktische, und Analytische, in Anwendung auf Künste und Gewerbe,' vol. 2, page 1,188, published in Braunschweig, in 1866, by C. A. Schwetschte und Sohn, and am certain that there is nothing found in any of these books which would so instruct a practical plater as to enable him to carry on electroplating with nickel, as a business or practical art. As regards the process given in the work just named, and which, as I understand, is conceded to contain the fullest information about nickel plating published prior to August 3d, 1869—in the first place, I do not consider that it gives sufficient information to enable a practical nickel plater, by simply following its directions, to make even an efficient nickel plating solution; secondly, it does not even suggest any of the conditions which are necessary to successfully carry on the art of electroplating with nickel, after a practical solution has been made. Dr. Adams was, in my opinion, the first to establish or discover the conditions under which successful nickel plating can be carried on, and I am convinced, by the result of my own experiments, that the conditions essential to practical success are correctly set forth in his patent of August 3d, 1869, and that it is necessary for the successful use of a nickel plating solution, that it should be prepared and used in such a manner as to be free, while the electro-deposition of the nickel is going on, from the presence of potash, soda, alumina, lime or nitric acid, or from any acid or alkaline reaction, and I know, from experiment, that, by a solution so prepared and used, a metallic article can be practically electroplated with a coating of compact, coherent, tenacious and flexible nickel, of sufficient thickness to protect the metal upon which the deposit is made, from the action of corrosive agents with which the article may come in contact." Professor Chandler gives like testimony in his affidavit.

The patent in question has been sustained, on final hearing, in the first and second Circuits. The plaintiffs show that they have granted some sixty licenses under it, in Massachusetts, Connecticut, New York, Ohio, Pennsylvania,

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The Union Paper Bag Machine Co. v. The Pultz and Walkley Co.

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Maryland, Maine, and Rhode Island, and that they are willing to grant licenses to responsible manufacturers, on fair and reasonable terms. They are entitled to be protected in their rights, and preliminary injunctions must issue in these cases, as prayed.

*Dickerson & Beaman*, for the plaintiffs.

*Roscoe Conkling* and *Frost & Coe*, for the defendants.

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THE UNION PAPER BAG MACHINE COMPANY AND OTHERS

v8.

THE PULTZ AND WALKLEY COMPANY AND OTHERS. IN EQUITY.

The decision in *Union Paper Bag Machine Co. v. Pultz and Walkley Co.*, (15 *Blatchf. C. C. R.*, 160,) sustaining the validity of the first claim of the letters patent granted to William Goodale, July 12th, 1859, for improvements in machinery for making paper bags, confirmed.

An inoperative and abandoned model, containing a three-cutter knife, existed and was known to the patentee, but he was the first to demonstrate that such a knife would, in an organized machine, cut a blank from a roll of paper in the flat sheet, by a transverse cut, so that the blank, when cut off, would be of the form ready to be folded into a bag. Having done so, he had a right to claim the knife separately.

(Before SHIPMAN, J., Connecticut, March 11th, 1879.)

SHIPMAN, J. Since the opinion in this case was filed, (15 *Blatchf. C. C. R.*, 160,) the question which will be hereafter considered has been reargued, upon the application of the defendant. The point at issue between the parties is the effect of the patentee's knowledge of the E. W. Goodale model upon the construction of the first claim. It being admitted that such a construction is to be given to the claim as

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The Union Paper Bag Machine Co. v. The Pultz and Walkley Co.

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will limit and restrict it to the actual invention which the patentee made, (*Estabrook v. Dunbar*, 10 *Off. Gaz. of Pat. Off.*, 909; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 *U. S.*, 274,) the defendants insist, that the invention of William Goodale, which is described in the first claim, consisted simply in his departure from, and improvement upon, the knife found in the E. W. Goodale model, of which knife the patentee is proved to have had knowledge. The precise question is—what was the invention of William Goodale?

If the E. W. Goodale knife had been an operative and effective piece of mechanism in a machine, the defendants would unquestionably be right, but it was, in fact, simply his idea expressed in a model, and communicated through that model to William Goodale. It was not a perfected but an inchoate invention. But, the defendants say, and this is the thought which runs through the argument of their counsel, that the model fully disclosed to William Goodale that the three-cutter system shown in the model was adequate to cut a bag blank from a roll of paper, suitable to be folded into a bag without further cutting out, and he cannot, therefore, claim broadly such cutting device, *per se*, but can only claim specific improvements upon the same, which were invented by him, or new combinations. If it is true, as matter of fact, that William Goodale knew that the "three-cutter system" was adequate, as a part of an organized machine, to accomplish the result mentioned in the first claim, then his invention was simply an advance in the art, and he can only claim his specific improvement.

The proved state of facts is this: An abandoned model of a machine containing the three-cutter system was known and understood by William Goodale, who invented a better cutting mechanism. A model existed, but it had been discarded. The patentee entered the field of invention and attempted to make a paper bag machine. He did not make it in accordance with the model. The model gave him ideas, and these ideas he first worked out to a successful issue. Now it is said the old model was the boundary of his inven-

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The Union Paper Bag Machine Co. v. The Pultz and Walkley Co.

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tion, because he knew that the method of the model would have been successful and was adequate to produce a successful result. The error of the defendant consists, as it seems to me, in the position, that the inoperative model, which could not make and never did make a blank, disclosed to William Goodale that its knife was, or could be, an effective cutting instrument in a machine, and that, therefore, his invention consisted solely in departing from the E. W. Goodale knife. The patentee's invention did not consist simply in making an improvement upon a pre-existing invention, because he did not know, and nobody knew, for nobody had ever made the experiment, whether that knife would make a blank, in a machine. The object of each experiment was to make a knife which, as a part of an organized machine, could cut a blank from a roll of paper in the flat sheet, by a transverse cut, so that the blank, when cut off, would be of the form ready to be folded into a bag. That result had not been accomplished. E. W. Goodale thought that he could accomplish it. He exhibited and abandoned his plan. Whether this plan would be successful was not then known, because it had not been tried ; but William Goodale attained success upon his independent plan.

If the patentee had believed or had known that the E. W. Goodale knife could not accomplish the work, and that it had been properly abandoned as a useless experiment, it could not justly be claimed that the patented invention consisted merely in being an improvement upon the abandoned knife. Is the position of William Goodale as an inventor altered by the fact, that, instead of believing that the knife of his brother was a useless knife, he knew nothing in regard to its utility, because its utility had never been tested, and then existed only in theory ? Its utility has now been proved, and it is natural to impute to William Goodale, at the date of his invention, the knowledge which is now enjoyed ; but no such knowledge then existed.

It is said, and said truly, that the subject of the first claim is a knife not in combination with any other part of

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The Union Paper Bag Machine Co. v. The Pultz and Walkley Co.

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the machine, and, therefore, for the purposes of this case, the knife, *per se*, was the thing which the patentee invented ; and it is strenuously insisted, that the Court must look at the two knives, disconnected from any other mechanism, and that it is obvious that the patentee knew, or must have known, that his brother's knife would cut the desired blank, and that there could have been no ignorance in regard to the feasibility of the device, for simple inspection would impart knowledge, and no experiment was necessary. But, the knife was not to be a hand tool. It was to be a part of an automatic bag machine, and, therefore, a knife was to be invented which could be used in connection with other parts of the machine, although, in the claim, it is, properly, separately claimed. Inspection would show that such a knife would cut out pieces of paper in the form of a blank. Inspection would not show that it would operate in the place where it necessarily must be used. The fact that such a knife would do the work was not a part of the fund of knowledge which the patentee had when he commenced to plan his invention.

If, then, as I think was the case, all that William Goodale knew was that the three-cutter system had been represented in a model, with which model he was familiar, and that the model had been laid aside, but did not, therefore, know that it was adequate to do the work, he started, as an independent inventor, into an unoccupied field of invention, and his invention is as broad as the territory which he actually reduced to possession.

For these reasons, I still give to the first claim the same construction which was given in the former opinion.

*George Harding*, for the plaintiffs.

*Charles E. Mitchell* and *Benjamin F. Thurston*, for the defendants.

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Vanderbilt v. Reynolds.

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WILLIAM H. VANDERBILT AND OTHERS, EXECUTORS, &C., OF  
CORNELIUS VANDERBILT, DECEASED

vs.

WILLIAM H. REYNOLDS AND OTHERS.

THE NORTH STAR.

Cross libels were filed in the District Court, in Admiralty, for a collision, one being a suit *in personam* and the other a suit *in rem*. In the first suit the District Court decreed damages and costs against the respondent. In the second suit, that Court dismissed the libel, with costs. The respondent in the first suit appealed, and the libellant in the second suit appealed. This Court, on the appeals, apportioned the damages sustained by the respective parties. One of the vessels was totally lost by the collision. The aggregate costs of both parties in this Court and in the District Court were divided by this Court equally between the parties.

The rule as to interest on damages and costs, stated.

(Before BLATCHFORD, J., Southern District of New York, March 14th, 1879.)

BLATCHFORD, J. In the first case, the District Court decreed against the respondents, November 10th, 1866, \$27,747 82 damages and \$276 76 costs. In the second case, the District Court dismissed the libel, May 17th, 1864, with \$420 96 costs. In the libel in the first case the claim was \$100,000. In the libel in the second case, the claim was "at least" \$75,000, "with interest." The respondents in the first case appealed from the whole of said decree therein, on the ground that the libel therein ought to have been dismissed. The libellants in the second case appealed from the whole of said decree therein, on the ground that they were entitled to recover their damages. This Court made a decree in each case, on said appeal therein, reversing the decree therein, and ordering that the damages sustained by the respective parties by the collision be apportioned. The damages sustained by the libellants in the second suit were not ascertained in the District Court. This Court ordered a reference in the second suit, to ascertain such damages, and reserved the question of costs in each suit.

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Vanderbilt v. Reynolds.

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The \$27,747 82, above mentioned, was made up thus :	
Repairs to the North Star, the vessel of the libellants in the first suit.....	\$5,141 43
Interest thereon for 4 years, to March 13th, 1866, the date of the Commissioner's report in that suit, in the District Court.....	1,083 90
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	\$6,225 33
Deterioration in the value of the North Star..	6,000 00
Demurrage, 17 days, at \$900 per day.....	15,300 00
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	\$27,525 33
The District Court, on the exception by the respondents in the first suit to the item of \$6,000 for deterioration, reduced it to \$5,000, thus deducting .....	
	1,000 00
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	\$26,525 33
Interest on \$26,525 33 from March 13th, 1866, (the date of the Commissioner's report) to November 10th, 1866, (the date of the decree).....	1,222 49
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	\$27,747 82

The Ella Warley, the vessel of the respondents in the first suit and the libellants in the second suit, was, with her outfit and stores, totally lost by the collision, on the 9th of February, 1863. This Court has fixed her value, at the time she was lost, at \$40,000, and the value of her outfit and stores lost, at that time, at \$7,675 90.

The costs of the several parties, other than as above specified, have been taxed as follows: Costs of the respondents in the first suit, in the District Court, \$58 40, and in this Court, \$31 50; costs of the libellants in the second suit, in the District Court, \$496 44, and in this Court, \$1,129 83; costs of the libellants in the first suit, in this Court, \$577 12; costs of the claimants in the second suit, in this Court, \$123 85.

The counsel for the owners of the North Star asks that the costs of all parties, in both Courts, be apportioned, as well as the damages. The counsel for the owners of the Ella Warley asks that they recover their costs of the District Court and of this Court.

The North Star recovered in the District Court, as damages, as follows: Repairs, \$5,141 43; deterioration, \$5,000; demurrage, \$15,300; total, \$25,441 43. In this Court it has recovered only one-half of that sum, which reduction has been effected by the appeal of the respondents in the first suit. In the District Court the Ella Warley recovered nothing. In this Court it has recovered the one-half of \$47,675 90, which recovery has been effected by the appeal of the libellants in the second suit. Throwing out interest, the North Star recovers \$12,720 72, and the Ella Warley recovers \$23,837 95, leaving a balance of recovery in favor of the Ella Warley, of \$11,117 23.

In *Hay v. La Neve*, (2 *Shaw's Scotch Appeal Cases*, 395,) in 1824, both vessels were held in fault, one only suing, and the House of Lords awarded to the vessel suing one-half of her damage, and ordered that each party bear his own costs. The Court referred to a case before Sir James Marriott, in 1789, where it was found that both ships were to blame, but one the most, and the loss was apportioned, and it was ordered that the costs of both parties be brought together and divided and borne equally by the parties; and remarked, that "it would, perhaps, be more equitable to say they should each pay their own expenses." In the cases of *The Monarch*, (1 *W. Rob.*, 21,) *The Oratava*, (5 *Monthly Law Mag., Notes of Cases*, 45,) and *The De Cock*, (*Id.*, 303,) all in 1839, Dr. Lushington, on the authority of *Hay v. La Neve*, ordered that each party should pay his own costs, the damages being apportioned. In *The Washington*, (5 *Jurist*, 1,067,) in 1841, where both vessels were held to blame, in cross actions, Dr. Lushington is reported as saying: "I decree the damages, costs and expenses of both parties to be thrown together, and to be equally divided, according to the precedent of

*Hay v. La Neve*, in the House of Lords." But this report must be incorrect. In the case of *Vaux v. Sheffer*, (8 *Moore's P. C. R.*, 75,) in 1852, there being cross suits, Dr. Lushington had held one vessel only in fault. She appealed. The Privy Council held both vessels in fault, and divided the damages, and said: "There will be no costs." In *The James*, (*Swabey*, 55,) in 1856, one party only suing, Dr. Lushington found both vessels in fault, and pronounced for one-half of the damage proceeded for, "but made no order as to costs." The claimants of the vessel sued appealed, and the Privy Council reversed the decree below, and held that the suit could not be maintained, but allowed no costs of the appeal. In *The Dumfries*, (*Swabey*, 125,) in 1856, the owners of a vessel totally lost by a collision sued the *Dumfries*, which was injured also. Dr. Lushington condemned the *Dumfries*. She appealed. The Privy Council held the *Dumfries* not to be in fault and the other vessel wholly to blame, and reversed the decree, and said: "But, as one vessel was wholly lost, and the other sustained much injury, and as the case is attended with many difficulties, they are of opinion that no costs ought to be allowed, either in this Court or the Court below." In *The Fyenoord*, (*Swabey*, 374,) in 1858, one vessel suing, Dr. Lushington held the vessel sued wholly in fault. She appealed. The Privy Council held both vessels in fault, and divided the damage, and said: "The appellants to have their costs of appeal." In *The Hibernia*, (5 *Irish Jurist*, N. S., 366,) in 1860, in the Irish Court of Admiralty, one vessel suing, the Court held both vessels in fault, and divided the damage, "each party paying his own costs." In *Maldox v. Fisher*, (1 *Lush.*, 270, and 14 *Moore's P. C. R.*, 103,) in 1861, there being cross suits, Dr. Lushington held one vessel solely to blame and she appealed. The Privy Council held both vessels in fault, and ordered the damages to be divided, and said: "The costs below must be disposed of according to the rule of the Admiralty in such cases. There will be no costs on either side, of this appeal." In *The Saxonia*, (1 *Lush.*, 410,) in 1862, there being cross

suits, between the Eclipse and the Saxonia, Dr. Lushington held both vessels to blame, and ordered the damages in each case to be divided, "each party to pay his own costs." The owners of the Saxonia appealed in both suits, and the owners of the Eclipse "adhered in each action to the appeal." Adherence by a respondent to an appeal by the other party, is an appeal by the respondent from the same decree, or a part of it, by filing a declaration of adhesion, stating from what part of the decree he desires to appeal. (*Williams & Bruce's Adm. Pr.*, 315, and *Appendix*, 190.) The Privy Council held both vessels to blame, and dismissed both appeals, "each party paying his own costs." In *The Agra*, (*Law Rep.*, 1 *Privy Council Appeals*, 501,) in 1867, there were cross suits. Dr. Lushington held the Agra wholly in fault, and condemned her in damages and costs. She appealed. The Privy Council held both vessels to blame, and divided the damages equally, (one of the vessels having foundered,) and said: "Each party will bear his own costs, both here and in the Court below." In *The Corinna*, (35 *Law Times Rep.*, N. S., 781,) in 1876, the Admiralty Court held the Corinna alone to blame. She appealed. The Court of Appeal found both vessels to blame and ordered the damages to be divided. The appellant applied for costs, contending, that, notwithstanding the rule of the Privy Council in such a case, he, being a successful appellant, should have costs. The Court followed the case of *The Agra*, and said: "In these cases, the rule of the Privy Council will be retained. Though the plaintiff has partially succeeded in his appeal, he is not found to be free from blame for the collision. Each party will bear his own costs, both here and in the Court below."

The English rule, applied to the present case, would require, therefore, that each party should bear his own costs, both in this Court and in the Court below.

In this country, the rule has not been uniform. In *The Rival*, (1 *Sprague*, 128,) in 1846, in the District Court for Massachusetts, both vessels were held to blame, and the damages were equally divided, but all the costs were imposed on

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Vanderbilt v. Reynolds.

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the vessel which was held to be most in fault. But, in *Lenox v. Winisimmet Co.*, (*Id.*, 160,) the same Court, in 1848, holding both vessels in fault, divided the aggregate damages equally, and decreed that each party pay one-half of the costs. In *The Bay State*, (1 *Abb. Adm. R.*, 235,) in 1848, in the District Court for this District, one vessel suing, both vessels were held in fault, and the libellants were awarded one-half of their damages, and no costs were allowed to either party against the other. In *The Schooner Catharine v. Dickinson*, (17 *Howard*, 170,) in 1854, the Supreme Court, for the first time, decided, that the proper rule of damages, where both vessels were in fault, was to divide the loss, but nothing was said about costs. In *The Nautilus*, (1 *Ware*, 529,) in 1854, the District Court for Maine, finding both vessels in fault, divided the whole damage to both between them by moieties, and ordered that each party pay his own costs. In *The Fanny Fern*, (1 *Newberry*, 158,) in 1854, the District Court for Ohio found both vessels in fault, and divided the loss, and ordered that the costs "be paid equally." In *The Miranda*, (1 *Newberry*, 227,) in 1854, the District Court for Illinois held both vessels in fault, and divided the aggregate damage equally between both parties, and ordered that each party pay his own costs, although one recovered \$150. In *The St. Charles*, (19 *Howard*, 109,) in 1856, the District Court had held one vessel wholly in fault, and the Circuit Court had held the other vessel wholly in fault and dismissed the libel. The libellants appealed to the Supreme Court, and that Court found both vessels in fault, and apportioned the loss, and gave to the appellants their costs of appeal in the Supreme Court. In *Chamberlain v. Ward*, (21 *Howard*, 548,) in 1858, there being cross-libels, the District Court for the Southern District of Ohio had found one vessel wholly in fault. She appealed to the Circuit Court. That Court held that each party must pay one-half of the damages occasioned by the collision, and of the costs in both Courts. Both parties appealed to the Supreme Court, which held that the case was one of mutual fault, and affirmed the decree of the Circuit

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Vanderbilt v. Reynolds.

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Court, without costs in the Supreme Court to either party. In *The Marcia Tribou*, (2 *Sprague*, 17,) in 1858, in the District Court for Massachusetts, both vessels were held in fault, and the damages and costs were ordered to be borne by each in equal proportions. In the same Court, in *O'Neil v. Sears*, (*Id.*, 52,) the same ruling was applied. In *The Bedford*, (5 *Blatchf. C. C. R.*, 200,) in this Court, in 1863, one party alone suing, the District Court had decreed for the libellants. The claimants appealed. This Court held both vessels in fault, and ordered the libellants' damages to be divided, and allowed no costs to either party in the Court below, but allowed the appellants their costs in this Court. In *The Austin*, (3 *Benedict*, 11,) in 1868, in the District Court for this District, one vessel alone suing, and having been injured, and both vessels being found in fault, the damages were apportioned, and costs were given to the libellants. In *The Baltic*, (*Id.*, 195,) and *The Paterson*, (*Id.*, 299,) both cases in 1869, the same Court, under the same circumstances, made the same ruling. In *Lane v. The Denike*, (3 *Clifford*, 117,) in 1868, there being cross suits, the District Court for Massachusetts had held one vessel wholly in fault and awarded full damages and costs to the other. On appeal, the Circuit Court held both vessels in fault and divided the damages and costs. In *The Maria Martin*, (12 *Wallace*, 31,) in 1870, the District Court for Wisconsin had dismissed the libel. On an appeal by the libellants to the Circuit Court, that Court had held both vessels in fault and made a decree that each should pay one-half of the damages and its own costs. The libellants appealed to the Supreme Court and the claimants did not. That Court held that the libellants' vessel was in fault, and affirmed the entire decree of the Circuit Court. In *The Favorita*, (4 *Benedict*, 132,) in 1870, in the District Court for the Eastern District of New York, the Court said: "The case is one of mutual fault, and, although I entertain no doubt as to the propriety, in a proper case, of mitigating the effect of the rule of equal division of loss, in cases of mutual fault, by awarding full costs to either party, I do not con-

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Vanderbilt v. Reynolds.

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sider that the present case calls for any deviation from the practice, which is to refuse costs to both parties, when both are equally in fault." The practice referred to was evidently based on the English rule. In *The Empire State*, (2 Bissell, 216,) in 1870, in the District Court for the Northern District of Illinois, both vessels were held in fault and the damages were divided, and each party was ordered to pay his own costs. In *The Mary Patten*, (2 Lowell, 196,) in 1872, in the District Court for Massachusetts, the question is considered by Judge Lowell. There were cross-libels, and, of course, injury to both vessels, and both were held in fault. Judge Lowell remarks, that the question, "whether the costs, like the damages, should be added together and divided, or each should bear his own, seems to be one of doubt." He refers to the case of *The Rival*, and says that "no question was made of the correctness of that decision, nor that the Court has full legal discretion over the whole matter of costs, to adapt its decrees to the equities of each case;" that there were no facts to take the case before him out of the ordinary rule, if there were one "applicable to an equality of fault;" and that it was "very difficult to find any rule from the decisions, in no one of which is there any argument or reason given at the bar or by the Court." He then refers to the case of *Hay v. La Neve*, as one in which the costs were divided, as well as the damages. I do not so understand that case, as to the costs. He then says, that, in the Massachusetts District, it has been the practice to divide the costs. He then refers to the cases of *The Nautilus*, *The Miranda*, *The Bedford*, and *The Favorita*, as cases in which costs were refused to both parties. He then adds: "There is one aspect of the question which does not appear to have received sufficient attention. If the loss is all suffered by one vessel, and her owner brings his libel, he will recover half his damages; and there is no reason why he should not, in general, recover his full costs. It is the ordinary case of a prevailing party recovering less than he asks for; and, if there has been no tender or offer of amends, and no equity peculiar to the individ-

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Vanderbilt v. Reynolds.

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ual case, it is according to the sound and reasonable law of all Courts, that he should recover costs. It would take a very long and uniform course of practice to establish any other rule in collision cases; and, although some of the decisions above cited were of that character, the point appears to have been overlooked. In examining some late authorities, since the above paragraph was written, I am happy to see that the recent practice in New York conforms to what I have suggested as the true rule, and gives costs to the libellant, if he alone has been injured and recovers half his loss." He cites, to this effect, the cases of *The Austin*, *The Baltic*, and *The Paterson*. He adds: "Returning to the case of injury on both sides, and of cross-libels to recover them, and no very substantial difference of fault or other equity, there appears to be authority for dividing the costs and for refusing them to both parties. The former practice, which has always been ours, seems to me quite consistent with the theory which divides the damages; and I shall adhere to it until the direct authority of an appellate Court, or a very decided preponderance of general practice, shall be against it." In *The Sapphire*, (18 *Wallace*, 51,) in 1873, the *Euryale* had sued the *Sapphire*, in the District Court for California, for a collision, claiming \$15,000 damages. There was no cross-libel, nor did the *Sapphire* set up, in the answer, that she had been damaged. The *Euryale* had a decree in the District Court for \$15,000 damages. The Circuit Court affirmed it. On appeal by the *Sapphire*, the Supreme Court held that both parties were in fault, and that the damages ought to be equally divided between them, and directed that a decree should be entered "in conformity with this opinion." The Circuit Court thereupon entered a decree in favor of the *Euryale* for \$7,500, and for her costs in the District and Circuit Courts, less the costs of the appeal by the *Sapphire* to the Supreme Court. The *Sapphire* appealed again to the Supreme Court, alleging, as errors, that no damage to the *Sapphire* was taken into consideration, and that costs in the Court below were allowed to the *Euryale*. For the *Sapphire* it was contended, that, in collis-

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Vanderbilt v. Reynolds.

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ion cases, where both parties were in fault, each should pay his own costs. The Supreme Court held that the only damages which could be divided in that particular case were those sustained by the *Euryale*. As to the costs, the Court say: "The appellants further complain, that it was erroneous to allow the libellant his costs in the District and Circuit Courts, deducting therefrom the costs allowed them by this Court—*i. e.*, the costs of the reversal of the former decree. We do not perceive, however, in this, any such error as requires our interposition. Costs in Admiralty are entirely under the control of the Court. They are, sometimes, from equitable considerations, denied to the party who recovers his demand, and they are sometimes given to a libellant who fails to recover anything, when he was misled to commence the suit by the act of the other party. Doubtless, they generally follow the decree, but circumstances of equity, of hardship, of oppression, or of negligence, induce the Court to depart from that rule in a great variety of cases. In the present case, the costs allowed to the libellant were incurred by him in his effort to recover what has been proved to be a just demand, and a denial of them, under the circumstances of the case, would, we think, be inequitable." In *The City of Hartford*, (7 *Benedict*, 510,) in 1874, in the District Court for this District, one vessel alone was injured and brought suit. Both vessels were held in fault and the damages were apportioned, the libellants recovering one-half of the damages they had sustained. The libellants asked for the costs of the cause. The Court said: "In this District the practice has been to allow costs, in a case of this kind, to the party who recovered, even though the amount he recovered was diminished by the application of the doctrine of apportionment because of mutual fault." Considering that practice to be sustained by the decision of the Supreme Court in *The Sapphire*, the Court gave to the libellants a decree for their costs. In *The America*, (2 *Otto*, 432,) in 1875, the owners of the *Fairfield*, sunk and totally lost by a collision with the *America*, had sued the latter in the District Court for this District. That Court dismissed

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Vanderbilt v. Reynolds.

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the libel. On appeal by the libellants, the Circuit Court reversed the decree, and awarded to the libellants \$17,723 75, with the costs of both Courts. The claimants appealed to the Supreme Court, and that Court held both vessels in fault, and "that the damages and the costs in both of the Courts below should be equally apportioned between the two vessels, as prescribed by the decisions of this Court," citing *The Catharine*, (17 How., 170,) *The St. Charles*, (19 How., 109,) and *The Maria Martin*, (12 Wall., 31.) The decision is stated thus: "Decree reversed, with costs in this Court, and the cause remanded, with directions to apportion the damages and the costs in both Courts below equally between the respective vessels, in conformity with the opinion of the Court."

The counsel for the owners of the North Star asks this Court to follow the ruling in the case of *The America*. There is no allusion in the opinion of the Court in *The America* to the decision in *The Sapphire*. In each case only one vessel sued, and there was no allegation of damage to the other vessel, and the Supreme Court, on an appeal by the vessel sued, reversed the decree of the Circuit Court, and reduced the libellants' damages by one-half, because both vessels were held in fault. Yet, in the earlier case, the Court held that it would be inequitable not to give to the libellants their costs of the District and Circuit Courts, and, in the latter case, it apportioned the costs in both of those Courts equally between the two vessels. In none of the cases cited by the Supreme Court in *The America*, did it apportion the costs of the Courts below equally between the parties. In *The Catharine* and *The St. Charles*, nothing was said about the costs below, and, in *The Maria Martin*, the decree of the Circuit Court, that each should pay his own costs, was affirmed. In *Chamberlain v. Ward*, the Circuit Court divided the damages and the costs of the District and Circuit Courts, and that decree was affirmed by the Supreme Court. In *Chamberlain v. Ward*, in *Lane v. Denike*, and in *The Mary Patten*, there were cross-libels, as in this case, and the costs were divided, as well as the damages. There is no case of cross-

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Vanderbilt v. Reynolds.

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libels, which I have been able to find, in this country, where both vessels have been found in fault, and the costs in the Courts inferior to the Supreme Court have not been divided. In the following cases, the costs of the lower Courts, as well as the damages, have been divided, where only one party sued and both were held in fault, viz.: *Lenox v. Winisimmet Co.*, *The Fanny Fern*, *The Marcia Tribou*, *O'Neil v. Sears*, and *The America*. In the following cases, where only one party sued, and the damages were divided, each party was left to pay his own costs of the lower Courts, viz.: *The Bay State*, *The Nautilus*, *The Miranda*, *The Bedford*, *The Maria Martin*, *The Favorita*, and *The Empire State*. In the following cases, where only one party sued, and the damages were divided, the libellant recovering had his costs of the lower Courts, viz.: *The Austin*, *The Baltic*, *The Paterson*, *The Sapphire*, and *The City of Hartford*. In *The Rival*, the damages, one vessel suing, were divided, and the costs were imposed on the vessel most in fault.

In view of the cases in this country, I think that the better rule is, that in a case like the present, of cross-libels and mutual fault, the aggregate costs of both parties in this Court and in the District Court must be divided equally between the parties. Whether *The America* is to be regarded as overruling *The Sapphire*, in a case like *The Sapphire*, is a question not involved in this case.

In regard to the damages sustained by the owners of the *North Star*, interest is not to be added on the \$27,747 82, from the time of the decree of the District Court, but the item of \$5,141 43 is to be taken, and interest paid on it from the time it was paid for repairs. The \$5,000 deterioration is to be taken, and interest is to be allowed on it from the date of the Commissioners' report, March 13th, 1866. The demurrage, \$15,300, is to be taken, and interest is to be allowed on it from the latter date. The interest on the money paid for repairs, may be at the rate of 7 *per cent. per annum*, and the other interest must be at the rate of 6 *per cent. per annum*. There can be no interest on the costs, either of the

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*In re* Accounts of the Shipping Commissioner of the Port of New York.

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District Court or of this Court. (*Deems v. The Albany and Canal Line*, 14 *Blatchf. C. C. R.*, 474.)

Let a decree be drawn in conformity with the foregoing decision.

*Robert D. Benedict*, for the Ella Warley.

*Augustus C. Brown*, for the North Star.

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IN THE MATTER OF THE ACCOUNTS OF THE SHIPPING COMMISSIONER OF THE PORT OF NEW YORK FOR THE YEARS 1876 AND 1877.

The question of the salaries of employees in the office of the shipping commissioner of the port of New York, considered.

The question of allowing to be paid out of the receipts of the office in one year, expenses incurred in the previous year, and not then paid because the receipts of that year were not large enough for the purpose, considered.

The shipping commissioner has, under § 4,505 of the Revised Statutes of the United States, the power to appoint clerks with the title of deputy commissioners.

(Before BLATCHFORD, J., Southern District of New York, March 24th, 1879.)

BLATCHFORD, J. The items and principles of the accounts of the shipping commissioner, in regard to expenses, for the years 1872, 1873, 1874 and 1875, were examined and approved by the master to whom such accounts were referred, and his report thereon was confirmed, on notice to the United States Attorney, by an order made by Judge Johnson on the 9th of January, 1877, and said order authorized the shipping commissioner to charge, as against the fees received in his office, the expenses set forth in said report as expenses of his office. The United States Attorney filed no exceptions to such report. That report showed that deputy C. D. Duncan received \$1,000 salary for 21 weeks in 1872, \$3,500

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*In re* Accounts of the Shipping Commissioner of the Port of New York.

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salary for the year 1873, \$3,900 salary for the year 1874, and \$4,000 salary for the year 1875; that deputy G. F. Duncan received \$645 salary for 21 weeks in 1872, \$3,000 salary for the year 1873, \$3,900 salary for the year 1874, and \$4,000 salary for the year 1875; and that deputy F. C. Duncan received \$900 salary in the year 1873, \$3,900 salary for the year 1874, and \$4,000 salary for the year 1875. In regard to those salaries, the shipping commissioner stated, under oath, before the master, November 1st, 1876, as follows: "The salaries paid to my deputies were the result of an understanding with Judge Woodruff. There is no fund but the fees of this office, out of which its expenses can be paid. The amount of that fund yearly is uncertain and irregular, while certain of the office expenses, such as commissioner's salary, rent, salaries of the clerks and outdoor men, are necessarily fixed, and should be paid. It was, therefore, arranged with all the deputies, that, after paying all such fixed expenses, the balance of fees should be apportioned among them, not, however, to exceed \$4,000 for any one year. By this arrangement, the deputies, in engaging for each year, have never known what their salary would amount to until the year ended, and they have received, in this way, salaries varying from \$2,400 to \$4,000. This year," that is, 1876, "the business of the office has been very much below that of any previous year. So far, my sons have had to be content with sums, or pay," for 1876, "averaging a rate of \$1,400 each per year, and Mr. Pentz with \$200 per month, or at the rate of \$2,400 per year. I have graded them according to their necessities. Their duties were about equal, and, in doing even this, I have had to give up about \$1,500 of my own salary. There is no means of knowing what the remaining two months of the year will do to improve our finances, but this is the situation at the end of ten months already passed." Mr. Pentz referred to was chief deputy, and received in 1872, 1873, 1874 and 1875, the same salaries as C. D. Duncan. There was another deputy, Mr. Jenks, who received in 1872, (for 21 weeks,) \$1,000, salary; in 1873, \$1,322 52, salary;

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*In re* Accounts of the Shipping Commissioner of the Port of New York.

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and in 1874, (for 49 weeks,) \$1,225, salary. There was another deputy, Mr. Kingsbury, who received, in 1872, (for 21 weeks,) \$1,000, salary. There was another deputy, H. E. Duncan, who received, in 1873, \$3,000, salary; in 1874, \$3,900, salary; and in 1875, \$4,000 salary. There were thus, in all, 5 deputies in 1872; 6 in 1873; 6 in 1874; and 5 in 1875. In 1872, the salaries to deputies, (for 21 weeks,) were \$4,645; in 1873, \$15,222 52; in 1874, \$20,725; and in 1875, \$20,000. There was also a bookkeeper, who received, in 1872, (for 21 weeks,) \$525, salary; in 1873, \$1,350, salary; in 1874, \$1,375, salary; and in 1875, \$1,325, salary. There were, in 1872, 6 clerks, who received, (for 21 weeks,) \$2,559, salary; in 1873, 7 clerks, who received \$4,948 52, salary; in 1874, 12 clerks, who received \$9,688, salary; and in 1875, 10 clerks, who received \$8,372 66, salary. There were, in 1872, 12 outdoor officers, who received, (for 21 weeks,) \$3,965 60, salary; in 1873, 10 outdoor officers, who received \$5,559, salary; in 1874, 6 outdoor officers, who received \$4,798, salary; and in 1875, 6 outdoor officers, who received \$5,274 50, salary. There was, in 1872, one watchman, who received \$10, salary. There were in 1872, one messenger, who received \$99, salary; in 1873, 2 messengers, who received \$98, salary; in 1874, 2 messengers, who received \$374, salary; and in 1875, 2 messengers, who received \$671, salary. There were in 1872, one boy, who received \$3, salary; in 1873, one boy, who received \$2, salary; in 1874, one boy, who received \$59, salary; and in 1875, one boy, who received \$29, salary. The commissioner himself appears to have had, as salary, in 1872, \$2,500; in 1873, \$5,000; in 1874, \$5,000; and in 1875, \$5,000. In 1872, the receipts were \$20,303 50, and the expenses \$20,960 50, creating a deficiency of \$657. In 1873, the receipts were \$37,765 15, and the expenses (including said \$657) were \$39,191 25, creating a deficiency of \$1,426 10. In 1874, the receipts were \$54,826, and the expenses (including said \$1,426 10) were \$54,699 88, leaving a surplus of \$126 12. In 1875, the receipts (including said \$126 12) were \$51,361 12, and

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*In re Accounts of the Shipping Commissioner of the Port of New York.*

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the expenses \$51,794 54, creating a deficiency of \$433 42. The order of January 9th, 1877, must be regarded as sanctioning the charge of the foregoing expenses against the fees, and the principle set forth as to the fixed expenses and the salaries of the deputies, and the propriety of paying a deficiency of one year out of a surplus of a succeeding year. It is, of course, always open to the District Attorney to show that any particular expenses or salaries are too large, if he raises the point at a proper time and in a proper manner.

The shipping commissioner filed, on the 11th of January, 1877, his detailed report of receipts and expenditures for the year 1876. It showed the receipts for the year 1876 to have been \$30,576 25, and the expenses (including the said deficiency of \$433 42 at the end of 1875) to have been \$31,149 03, leaving a deficiency, at the end of 1876, of \$572 78. The salaries paid in 1876 were as follows: C. C. Duncan, commissioner, \$4,275 51; John H. Pentz, deputy, \$2,450; C. D. Duncan, deputy, \$2,450; F. C. Duncan, deputy, \$2,450; G. F. Duncan, deputy, \$2,450; H. E. Duncan, deputy, \$1,100; one bookkeeper, \$1,300; 6 clerks, \$2,274 32; 7 outdoor officers, \$2,631; one messenger, \$170; and four boys, \$293. The master to whom it was referred to examine said account and report in reference thereto, reported, in his report filed February 14th, 1877, that he had been attended by the shipping commissioner and the District Attorney, and had examined the shipping commissioner under oath, respecting said accounts, and had carefully investigated their details, and had examined the vouchers, 472 in number, for the items of expenditure, and had passed said account, leaving said debit of \$572 78. No order has ever been made confirming said report, or acting thereon, nor has the District Attorney filed any exception thereto.

The shipping commissioner filed, early in 1878, his detailed report of receipts and expenditures for the year 1877. It showed the receipts for the year 1877 to have been \$28,650 25, and the expenses (including the said deficiency of \$572 78, at the end of 1876) to have been \$28,870 58, leav-

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*In re Accounts of the Shipping Commissioner of the Port of New York.*

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ing a deficiency, at the end of 1877, of \$220 33. The salaries paid in 1877 were as follows: C. C. Duncan, commissioner, \$5,000; F. C. Duncan, deputy, \$3,800; G. F. Duncan, deputy, \$3,800; John H. Pentz, deputy, \$1,400; C. D. Duncan, deputy, \$1,900; one bookkeeper, \$1,360; 4 clerks, \$2,587 50; 5 outdoor officers, \$2,258 50; one engineer and messenger, \$155; and 3 boys, \$298. The master to whom it was referred to examine said account and report in reference thereto, reported, in his report filed February 26th, 1878, that he had been attended by the shipping commissioner and the District Attorney, and had examined the shipping commissioner under oath, in a deposition annexed, and had carefully investigated the details of said account, and had examined the vouchers, 451 in number, for the various items of expenditure therein, and had passed said account, leaving said debit of \$220 33.

On the 6th of March, 1878, the United States, by the District Attorney, filed exceptions to said report filed February 26th, 1878, to the effect, that, upon said deposition of the shipping commissioner, the master should have reported that the salaries paid to the three deputy commissioners, F. C. Duncan, G. F. Duncan and C. D. Duncan, at the rate of \$3,800 per year each, were entirely too large for the work performed by them; that the item of \$572 78, deficiency at the end of 1876, should not have been allowed as a charge against the receipts of 1877; that it appears, from said deposition, that the deputy shipping commissioners' duties at the port of New York consist only of shipping and discharging sailors; that there was but one person apprenticed to sea service during 1877; that the power of the shipping commissioner to employ clerks, granted to him by § 4,505 of the Revised Statutes, does not authorize the appointment of deputy commissioners; that it appears from the accounts of said shipping commissioner on the files of this Court, that the receipts of said shipping commissioner have amounted to various sums from \$28,000 to \$50,000 a year, and have been entirely consumed by the charges of said commissioner; that it

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*In re Accounts of the Shipping Commissioner of the Port of New York.*

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appears to be the practice of said commissioner to make such a disposition of the receipts of the office as to use them up; that the salaries of the deputy commissioners were \$2,500 each for the year 1876, and \$3,800 each for the year 1877; and that the commissioner undertakes to explain such increase in salaries by stating that the salaries are flexible and states no other reason therefor.

In the deposition referred to the shipping commissioner testifies as follows, on his direct-examination, "From the time of my first appointment, in 1872, when the shipping law took effect, I consulted with Judge Woodruff at every step. The rental of the offices, the salaries of the deputies and other employees, were arranged with his full knowledge and consent. The expenses of the office could only be borne out of the fees, which were fluctuating, and it was decided, that, while certain expenses, such as rental, clerk hire, outdoor officers, fuel, lights, &c., had to be fixed and provided for, the salaries of myself and the deputies must needs be flexible. It was arranged, that all the deputies, at the beginning of each year, should sign an agreement, by which they should render their services for the entire current year, accepting such pay therefor as the fees of the office would yield after the before-mentioned fixed expenses were paid, such salaries in no case to exceed four thousand dollars. Under this arrangement the salaries of the deputies have varied, from year to year, from \$1,200 to \$4,000. I have never, in any one year, received my own salary entire for that year. The salaries of the deputies, in 1876, were \$4,000 each. In 1877, it was \$2,550 each. The first four months of 1877 would have yielded the deputies \$1,800 a year, one \$2,400 a year, and myself about \$3,500 a year. I submitted the whole matter to Judge Johnson personally, on my first interview with him, and he used the expression: "I don't see, under the circumstances, how you can do any differently." The salaries for that year amounted to \$3,800, the largest; one, a half year, at \$1,900; and Mr. Pentz \$200 a month until he died, which, I think, was in August." On his cross-examination by the As-



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*In re* Accounts of the Shipping Commissioner of the Port of New York.

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on blanks which we have there, for the voyage which he is about to enter on. He applies to the deputy on the shipping side of the office. He signs a written request for me to furnish the crew that he requires. He appoints a time, generally, the next day, for the shipment of his crew. At the hour given, which we make known, the floor is usually well filled with sailors seeking employment at the shipping commissioner's office. The sailors must all be sober and orderly. The captain and my deputy stand behind a rail and desk. The captain selects such men as he chooses, and calls them in one by one. The nature of the voyage is thoroughly explained to the seaman, and, if my deputy knows anything bad about the man's record, the captain is informed of it before the man signs. After the whole crew have signed articles of agreement, which they do in that room, they are cautioned by my deputy to pay no blood money for their chance. This is a tax exacted by captains, mates and landlords, for supposed influence in procuring them situations. Their advance notes are then filled out. Each sailor, on leaving port on a foreign voyage, is entitled, by custom, to advance wages, for from one to two months. This is paid by what is called an advance note, given to the sailor and payable three days after the ship sails, if he is on board and earning his wages. These notes are handed to the seamen after they have shipped. This completes the shipment of seamen. After this the captain notifies the deputy the day and hour at which he wishes the crew on board for departure. The deputy details this work to our outdoor officers, who, at the proper time, gather up the sailors from their different boarding-houses, and put them on board. If, at this time, sailors are drunk and disorderly, who have shipped, they are, at the request of the captain, removed, and others taken in their places. The entire crew, being on board at the dock, sober and orderly, are mustered by my officers and examined touching their settlements with their landlords. Complaints of foul treatment, if any, are heard and reported to me. The names of all on board are checked and reported to the deputy at the office by



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*In re* Accounts of the Shipping Commissioner of the Port of New York.

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Courts, hearing complaints of seamen, answering correspondence touching missing seamen, from all parts of the world, and instructing ship-masters and owners. Q. I see F. C. Duncan, G. F. Duncan and C. D. Duncan on the pay roll of the shipping commissioner for 1877, the first two receiving salaries of \$3,800 each and the third receiving \$1,900 for six months. Are they relatives of yours? A. Sons. C. D. Duncan, my son, owned, and still owns, a plantation in Florida, from which I called him to assist me and to which he has since returned. F. C. Duncan was master of the *Kate Davenport*, a large ship in the East India trade, which I requested him to leave and come to my assistance. George F. Duncan was engaged in the jewelry business, and I requested his assistance also. All this in 1872, when I first came into the office."

The receipts of the shipping commissioner's office, from shipping fees, were, in 1872, (from August 1st,) \$15,922; in 1873, \$29,762; in 1874, \$41,500; in 1875, \$39,200; in 1876, \$23,062; in 1877, \$22,625. Its receipts from paying-off fees, on discharge, were, in 1872, (from August 1st,) \$4,381 50; in 1873, \$8,003 15; in 1874, \$13,326; in 1875, \$12,035; in 1876, \$6,711 25; in 1877, \$5,825 25. The number of seamen shipped by the office was, in 1872, (from August 1st,) 10,541; in 1873, 16,756; in 1874, 26,636; in 1875, 25,408; in 1876, 13,346; in 1877, 12,165. The number of seamen paid off by the office, on their discharge, was, in 1872, (from August 1st,) 7,785; in 1873, 15,832; in 1874, 27,756; in 1875, 24,277; in 1876, 13,477; in 1877, 11,660. The amount of money paid by the office into the hands of seamen for wages due and accruing to them, was, in 1872, (from August 1st,) \$384,241 82; in 1873, \$1,182,103 17; in 1874, \$1,653,186 08; in 1875, \$1,517,762 23; in 1876, \$946,844 21; in 1877, \$856,220 43. The amount of money collected by the office and paid into this Court, for wages of deceased seamen, was, in 1872, (from August 1st,) \$847 56; in 1873, \$3,945 10; in 1874, \$3,333 58; in 1875, \$1,923 69; in 1876, \$3,205 28; in 1877, \$1,485 80.

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*In re Accounts of the Shipping Commissioner of the Port of New York.*

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(1.) As to the allegation, that, on the deposition of the shipping commissioner, the master should have reported that the salaries, at the rate of \$3,800 a year, paid to the three deputy commissioners, F. C. Duncan, G. F. Duncan and C. D. Duncan, were entirely too large for the work performed by them. There is nothing to show that any such point was taken by the District Attorney before the master. Nor was any evidence introduced before the master, by the District Attorney, to show that the salaries of the deputies were too large for the work performed by them. No witness expresses an opinion to that effect, nor was the shipping commissioner asked whether he could not have obtained competent persons to discharge the duties so performed for a less compensation, nor was any evidence given that he could. The arrangement made is testified to have had the sanction of each of my predecessors, Judges Woodruff and Johnson. The three deputies named were deputies from the beginning. The arrangement was one which sanctioned a salary of \$4,000 to each of them, if the fees of the office would pay it. It has never exceeded that sum. The commissioner and the deputies had a right to rely on the arrangement, until it should be shown, on notice and hearing, that the salaries ought to be reduced. These observations cover the above named accounts. I do not intend to say, however, that the salaries of the deputies and of other subordinates ought not be reduced and their number fixed for the future, nor do I intend to say that they ought. The propriety of the salaries paid was not questioned before the Court by the District Attorney until the report for the year 1877 was brought up, although the arrangement was fully explained by the shipping commissioner in his deposition of November 1st, 1876, in regard to the accounts down to the close of 1875. Under § 4,501 of the Revised Statutes, the Court has power to regulate the mode of conducting business in the office of the shipping commissioner, and has full and complete control over the same. If the District Attorney desires an order of reference to a master to take proof as to what the number of

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*In re Accounts of the Shipping Commissioner of the Port of New York.*

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employees in the office of the shipping commissioner should be for the future, and what their salaries should be, and what would be a proper arrangement in regard to those matters, to be sanctioned by the Court, such an order will be made.

(2.) As to the claim that the \$572 78 should not have been allowed by the master as a charge against the receipts of 1877, I do not think the exception can be allowed. It does not appear that the point was raised before the master. The practice was sanctioned by the District Attorney, in reference to the deficiency of \$657, in 1872, and in reference to the deficiency of \$1,426 10 at the end of 1873, and in reference to the surplus of \$126 12 at the end of 1874, and in reference to the deficiency of \$433 42 at the end of 1875, by his not excepting to the report in reference to the accounts for those years. This Court, in May, 1876, in *In re The Shipping Commissioner*, (13 *Blatchf. C. C. R.*, 339,) said, in reference to the accounts down to the close of 1875: "The Act in question is not a revenue law. There is in it no intention manifested to raise any revenue for the United States out of the fees to be paid under it. It is entirely consistent with its scope and purpose, that Congress designed that the system established by it should be self-sustaining as to expenses and emoluments, and that any surplus thereafter of fees should be paid into the Treasury, in order that Congress might, in view of the amount, if any, of such surplus, so re-adjust the fees as to make the system no more than self-sustaining." The shipping commissioner had a right to rely on the principle, as an established one, that he would be allowed to charge the \$572 78 against the receipts of 1877. If a change in that respect is to be made for the future it should be made by an order of the Court, on notice and hearing.

(3.) As to the claim that the power of the shipping commissioner to employ clerks, granted to him by § 4,505 of the Revised Statutes, does not authorize the appointment of deputy commissioners. The proceedings before recited show that there have been deputy commissioners from the beginning, and that the propriety of their appointment has been



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Burdett v. Estey.

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RILEY BURDETT

vs.

JACOB ESTEY AND OTHERS. IN EQUITY.

The question of what is an infringement of the second claim of the patent granted to Riley Burdett, February 23d, 1869, for an "improvement in reed organs," considered, in view of the decision in *Burdett v. Estey*, (15 *Blatchf. C. C. R.*, 349.)

On a motion for an attachment for contempt for violating an injunction issued to restrain the infringement of a patent, after a construction has been given to the patent by the Court, no testimony is proper to vary such construction. It is a matter of discretion, whether the Court, on such a motion, will require expert testimony on the question of infringement, or will examine the alleged infringing article for itself.

A structure which has an intermediate partial set of reeds, extending downwards through the scale to tenor F, and placed horizontally on the top of, and in addition to, a common double reed board, with both the vibrating and the stationary ends of the reeds the full thickness of the reed board above the other sets and above the entrances to the air passages, and the valve openings from tenor F downward gradually and uniformly lengthening till the lower and longest one is about half an inch longer than those above tenor F, does not infringe the second claim of said patent.

The decision on the motion for attachment was made without prejudice to the raising of the same question of infringement on the accounting under the interlocutory decree.

(Before WHEELER, J., Vermont, March 24th, 1879.)

WHEELER, J. This cause (15 *Blatchf. C. C. R.*, 349,) has been further heard upon the motion of the plaintiff for an attachment against the defendants for an alleged violation of the injunction therein. The motion is founded upon the affidavit of Silas M. Waite, which states, in substance, that the defendant Fuller brought to him a reed board and foundation board of an organ, combined, and said that the defendants were making such boards and putting them in their organs. The defendants appear, and, without making any

\* objection to the form of procedure or filing any answer, present the affidavit of Fuller, in which he states that they are making such boards and using them in their organs, but that he is a mechanic and familiar with the proceedings in the cause, and with the manufacture of organs, and that, in his opinion, these boards do not violate the injunction. The sample taken to Waite is referred to and made a part of his affidavit.

The defendants insist, that, without the testimony of some witness, taken in writing, so as to be capable of being spread upon the record, and showing, apart from the reed board and foundation board, which cannot be spread upon the record, that the making and using these boards is a violation of the injunction, there is not sufficient ground shown to warrant proceeding with the motion; that, if the motion is to be proceeded with, they wish to show, that, in 1866, they constructed reed and foundation boards with valve openings similar to these down to tenor F, and that one-half of all the organs made by them for the past five years have been made with reed and foundation boards like these; and that, upon inspection of this sample, without evidence otherwise, it is apparent that the manufacture and use of such boards do not violate the injunction.

The decree was, that the patent, to the extent of the first and second claims, was valid, and that the defendants had infringed it. The injunction was founded upon the decree, but was general in its terms, commanding the defendants to refrain from further infringement. The scope of the injunction would be according to the construction of the patent given to it by the Court. No testimony would be proper or of any effect to vary that. If the exhibit was of that character that its parts and their workings could not be understood but by persons of peculiar skill, it would be necessary to call such persons to explain them; but they are not. Any person who understands the subject so as to comprehend the decree and the grounds of it, can understand this exhibit.

The invention covered by the patent was made in 1867,

and the patent was granted in 1869. So, the testimony suggested, if it would have any bearing whatever, would affect the decision on which the decree and injunction are founded, and the validity of the injunction itself, which is not in any respect open on this motion, and not what has been done since the injunction.

The testimony mentioned as to what has been done during the past five years, would only affect the extent of the violation since the injunction, and of the liability to account both before and since, if this is a violation, and not the question whether it is in fact a violation.

The fact of making and using things like the exhibit is not disputed, but is fully proved and admitted by the defendants themselves. Whether that constitutes a violation of the injunction is the question directly and fairly presented. In *Kelleher v. Darling*, (14 *Off. Gaz. of Patent Office*, 673, 678,) Mr. Justice Clifford said: "Where the invention is embodied in a machine, manufacture, or product, the question of infringement, which is a question of fact, is ordinarily best determined by a comparison of the exhibit made by the respondent with the mechanism described in the complainant's patent." It would, doubtless, be entirely competent, and is understood to be sometimes the practice, for the Court, on questions of this sort, to refuse to examine exhibits for itself, until the testimony of some person of skill, to prove the infringement or violation, has been taken; but that would seem to be wholly a matter of discretion, and it must be equally competent for the Court to examine the exhibits and determine the question upon them, if it sees fit to do so.

This exhibit is like the manufacture which embodies the plaintiff's patent, in all respects but two. One of these respects is, that, in this exhibit, the intermediate partial set of reeds, extending downward through the scale to tenor F, is placed horizontally on the top of, and in an addition to, a common double reed board, with both the vibrating and the stationary ends of the reeds the full thickness of the reed board above the other sets, and above the entrances to the air

passages, while, in the plaintiff's invention, the intermediate partial set extends obliquely between the other two sets to the foundation board, with the vibrating ends of the reeds substantially on the same base as those of the other two sets. The other respect is, that, in this exhibit, the valve openings, from tenor F downward, gradually and uniformly lengthen, till the lower and longest one is about a half inch longer than those above tenor F, while, in the plaintiff's invention, they are of uniform length throughout.

This latter variation makes a different thing from those embodying the plaintiff's invention, so far as the variation extends; but, if the rest of it was like the plaintiff's, the variation would not save the infringement and violation to the extent of the rest, for, to that extent, the defendants would be using the patented invention. In this respect, this case would be like *Smith v. L. & N. W. R. W. Co.*, (20 *Eng. Law & Eq. Rep.*, 94.) There, it was held, that a patent for a wheel made of certain materials and in a particular manner was infringed by a wheel made in part of those materials and in that manner, although the rest was wholly different. So, the question is, whether the defendants infringe by making reed and foundation boards with the horizontal partial set instead of the plaintiff's inclined set.

The plaintiff's patent is really for a combination of parts, and not for any of the parts themselves, although the word is not used to describe the invention, either in the specification or claims. In describing the nature of his invention, in the fore part of his specification, he says: "This invention consists, first, in the arrangement of the reed board; second, in the method of tuning," &c. The part in relation to the arrangement of the reed board is all that has been sustained and is now in question. The first claim is: "The arrangement, in a reed musical instrument, of the reed board, A, having the diapason set, *a*, and its octave set, *b*, and the additional set, L, extending from about at tenor F upward through the scale, substantially as and to the effect set forth." The second claim is: "The reed board, A, and foundation

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Burdett v. Estey.

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board, G, constructed with the contracted valve openings, D, F, F, and the reeds arranged in relation thereto, all in the manner described." None of these parts were new. There were before organs with two sets of reeds having the same valve openings, contracted, in the sense used, and there was, according to the finding, one organ in use having an inclined partial set of reeds extending from tenor F upward. But, there was no organ containing these things arranged as the plaintiff arranged them. He invented this new arrangement or combination of them, and was entitled to, and obtained a patent for that. If the exhibit embodies that, the defendants infringe by making things like it, and are guilty; otherwise, not.

The plaintiff claims that the defendants infringe the second claim of the patent, and refers most particularly to the valve openings. It follows, directly, from what has preceded, that the plaintiff has no patent for any sort of valve openings, and that the defendants cannot infringe by the mere use of any, however made, of whatever shape or size. More than that must be brought in. There must be the reed and foundation boards constructed with the contracted valve openings, and the reeds arranged in relation thereto, all in the manner described. So, it comes back again to the arrangement or combination of the reeds with the valve openings, in the boards. It is well settled, that, where there is a patent for a combination of old parts, there can be no infringement unless all the material parts are used, because, without one of them, the combination or arrangement would be different. (*Prouty v. Ruggles*, 16 *Pet.*, 336; *Vance v. Campbell*, 1 *Black*, 427; *Gill v. Wells*, 22 *Wall.*, 1.) One of the elements of the plaintiff's combination is the inclined partial set, extending down between the other two sets to substantially the same base. That element is wanting in the defendants' organs, in controversy on this motion, unless their horizontal set is an equivalent for it. In a patent for a combination, the use of equivalents known to be such at the date of the patent, may be excluded. (*Gould v. Rees*, 15

187; *Gill v. Wells*, 22 Wall., 1.) Prior to 1866, horizontal sets of reeds, placed on top of the reed board, above sets, were well known, and had been patented to G. Hunt, of Wolcottville, Conn., and the plaintiff obtained a patent for bringing them down on an incline, so that vibrating ends would be on the same base as the other and equally near the valve openings with them, whereby they could take the rush of air at the same time, and speak equally with them, which patent the plaintiff transferred to the defendants. The improvement covered by that patent was exactly the difference between the plaintiff's inclined sets and the defendants' horizontal sets, here. One is not an improvement over the other, and the plaintiff cannot justly now claim it to be. And the plaintiff's patent was, and could not be sustained, upon the finding which was reached, upon such evidence. Had the plaintiff's patent been for a partial set, extending upwards, combined with the two sets of a similar reed board, it would have failed, because Arvidson's organ, defendants' exhibit 21, in the principal case, had anticipated it. But it was not for that, and did not profess to be; it was for an inclined set extending downwards, and to the same base with, the other two, and not distinguished. In this respect the defendants' organs now in issue are nearer like Dayton's than they are like the plaintiff's. The position of the vibrating ends of the reeds relative to the valve openings is of more importance than the position of the rest of the reeds, and the positions of those in Dayton's and the defendants' organs are nearly the same.

It would be manifestly unjust to hold that there was no difference between Dayton's organ and the plaintiff's and then to sustain the plaintiff's patent, and then to hold that the position of the defendants' organ is equivalent to the plaintiff's and to sustain this claim of infringement. So, the reed and tone boards are not alike, even down to tenor F, and the defendants are not guilty of any violation of the injunction making them. If the boards were alike to that extent the case would be like *Sellers v. Dickinson*, (6 Eng. Law

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Burdett v. Estey.

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& *Eq. Rep.*, 544,) in some respects, where the use of a part of a patented combination was, under the circumstances, held to be an infringement. Upon this view, the motion must be denied.

This decision upon this question, so far as it affects this motion, is not reviewable. The same question may arise in the accounting now going on, and be important there, and be reviewable so far as it would affect that proceeding, unless the decision here would in some manner be conclusive upon the parties. And it is of much more importance to the interests of justice that the decision of this question upon the accounting should be correct, than that the decision upon this motion should be, for, if the plaintiff is entitled to the restraint sought here, he will be entitled to the profits and damages arising from the acts sought to be restrained, which, in contemplation of law, will compensate him; and, if not entitled, he loses nothing here or there. And, if the defendants are liable to the restraint, they will make good their liability there, while, if not, they ought not to, and will not, suffer anything here or there. Therefore, this decision ought not to be conclusive upon any question that may be raised there, and should be limited so as clearly not to be.

The motion is denied, without prejudice to either party, elsewhere than upon the motion.

*Edward J. Phelps*, for the plaintiff.

*Edward N. Dickerson* and *Charles C. Beaman, Jr.*, for the defendants.

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*In re Samuel Wilson and Thomas Greig, Bankrupts.*

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IN THE MATTER OF SAMUEL WILSON AND THOMAS GREIG,  
ALLEGED BANKRUPTS.

Under the statute in regard to compositions in bankruptcy, (*Act of June 22d, 1874, §§ 17, 18 U. S. Stat. at Large, 182,*) a debtor may be excused by the creditors from answering inquiries, even though he is present at the meeting of creditors.

On a review in bankruptcy the Circuit Court cannot consider objections to a proceeding in composition, that were not taken in the District Court.

It is no valid objection to a composition, that it is unsecured and payable in instalments, and that the property of the debtor is restored to him, to be dealt with at his pleasure.

When questions of policy and expediency have been fairly before the creditors and disposed of by them, and their action has been approved by the register and the District Court, such action will not be interfered with by the Circuit Court, on review.

The provisions of the composition in this case considered and held not to violate the statute or to be improper.

(Before BLATCHFORD, J., Southern District of New York, March 26th, 1879.)

BLATCHFORD, J. The record shows, that, at the first meeting of creditors in regard to the composition, on April 24th, 1878, it was stated, by the counsel for the debtors, that Mr. Greig was prevented, by sickness, from attending the meeting, and that Mr. Greig's physician was in attendance to testify to facts in support of such statement. The physician was then examined and was cross-examined by five counsel for various creditors, and, among them, by the counsel for Brigg, Entz & Co., the creditors who bring this petition of review. During such examination, Mr. Greig appeared. The meeting was then adjourned to April 25th, 1878, at 9.30 A. M. On that day, between 9.30 and 10 A. M., Mr. Greig appeared, but he retired before 10 A. M., and before the opening of the meeting, and was not present at its opening. A resolution was then moved that Mr. Greig be excused from further attendance at such meeting and at any adjournment thereof, and from submitting himself to any examina-

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*In re Samuel Wilson and Thomas Greig, Bankrupts.*

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tion at such meeting. The counsel for Brigg, Entz & Co. objected to the resolution. The vote in its favor was 40 creditors, representing \$75,613 75, out of a total of 46 creditors, representing \$94,487 30. The resolution was declared to be passed. Mr. Wilson, the other debtor, was then examined, and, among others, by the counsel for Brigg, Entz & Co. The resolution of composition was then presented to be voted on, and the counsel for Brigg, Entz & Co. objected to the taking of a vote on it, because Mr. Greig was not present to answer inquiries. The objection was overruled by the register. The resolution of composition was then put to vote, and was passed by 34 creditors out of 36 whose claims exceeded \$50 each, and who were represented or assembled at the meeting, and by an aggregate indebtedness, including claims under \$50 each, of \$75,613 75. Two creditors, representing \$13,376 27, voted in the negative. It was then agreed that the counsel for Brigg, Entz & Co. might raise, on the final hearing, any objections which he could raise on the application for the second meeting.

At the second meeting, held on the 8th of May, 1878, the counsel for Brigg, Entz & Co. presented the following objections to the confirmation of the resolution of composition: (1.) That, although Mr. Greig was present at the first meeting, he did not answer any inquiries made of him, and it did not appear that he was prevented from being at such meeting by reason of any satisfactory cause, and the resolution passed, purporting to excuse him from further attendance at the first meeting, was without authority of law, under the circumstances above set forth; (2.) That it appeared that the resolution of composition was not for the best interest of all concerned, and that the resolution could not proceed without great injustice and undue delay to the creditors. On the 8th of May Mr. Brigg and Mr. Entz were examined by their counsel and Mr. Wilson was examined. On the 9th and 10th of May Mr. Wilson was further examined, and a witness was examined. On the 11th of May Mr. Wilson and Mr. Greig were examined by counsel for creditors other than

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*In re Samuel Wilson and Thomas Greig, Bankrupts.*

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Brigg, Entz & Co. On the 13th of May Mr. Wilson and a witness were examined. On the 29th of May Mr. Wilson was further examined. On the 13th of June Mr. Brigg was further examined. The record shows that the counsel for Brigg, Entz & Co. was present on the 8th of May, but it does not show that he was afterwards present except on the 13th of June.

In regard to Mr. Greig it is contended, that, even though the debtor might be excused from attending, when absent, he could not be excused from answering, when present. The provision of the statute is, that "the debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same and shall answer any inquiries made of him." The good sense of this provision is, that the debtor may, for a cause satisfactory to the meeting, be excused from answering inquiries. Of course, he cannot answer inquiries then and there made, unless he is present. But, even if he is physically present, he may be unfit to answer inquiries. The present is a case of that kind. While the physician was testifying as to the propriety of examining Mr. Greig, Mr. Greig came in. The creditors and their counsel had an opportunity of seeing him, in connection with the testimony of the physician, and thereupon they voted to excuse him from attending and from being examined at the first meeting. He was examined sixteen days afterwards, at the second meeting. The testimony of the physician showed satisfactorily that Mr. Greig was not in a fit mental condition to be examined at the time the resolution excusing him was passed. But, he was only excused from being examined at the first meeting. He was present and was examined at the second meeting. If the counsel for Brigg, Entz & Co. had applied for leave to examine him, the privilege, doubtless, would have been granted. Although such counsel may not have been aware that Mr. Greig was being examined, yet he was present before the register on the 13th of June, and the proceedings before the register were kept open until the 6th of August. The objections

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*In re Samuel Wilson and Thomas Greig, Bankrupts.*

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filed in the District Court by the counsel for Brigg, Entz & Co. in respect to Mr. Greig are wholly confined to what took place at the first meeting, and the record shows no objection in the District Court in respect to the non-examination of Mr. Greig at the second meeting by the counsel for Brigg, Entz & Co. This Court cannot, on review, consider objections that were not taken in the District Court.

The views of this Court, expressed by Chief Justice Waite, in *In re Wronkow*, (15 *Blatchf. C. C. R.*, 38,) are applicable to the objection above considered. In that case, one objection taken in this Court to the resolution of composition was, that one of the bankrupts was, at the first meeting of creditors, excused from attendance, without sufficient cause. This Court said: "The law itself does not make it obligatory upon the bankrupt to be present except at the first meeting. He is to be present unless prevented by sickness or other cause satisfactory to the meeting. (Of the sufficiency of the cause the creditors themselves are to decide in the first instance, and their decision should not be disturbed by the Court, except for good cause shown. It must in some form appear that wrong has been done to the minority creditors, by reason of the vote which was given. After the District Court has affirmed the action of the majority, this Court, in the exercise of its supervisory jurisdiction, ought not to interfere except in a very clear case. While the rights of the minority creditors should be carefully watched and protected against all unreasonable acts of the majority, the judgment of the requisite majority should always be allowed to prevail, unless obtained without sufficient consideration, or by some unfairness or undue influence. In this case, the excuse presented for one of the debtors was his absence in California, where he resided. This was fairly submitted to the meeting. It seems to have been fairly considered. The meeting was well attended. All the objections made were fully presented and duly deliberated upon. The result was a vote in favor of the sufficiency of the excuse." In that case, the objecting creditors did not attend the first meeting. Here,

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*In re Samuel Wilson and Thomas Greig, Bankrupts.*

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they were present at it and took part in the proceedings in reference to excusing Mr. Greig. The objection is overruled.

The composition was 35 *per cent.* in money, without interest, payable in 5 instalments, of 7 *per cent.* each, in 3, 6, 9, 12 and 15 months respectively, to be evidenced by the promissory notes of the debtors. The resolution contained the following provision: "The injunction heretofore granted in these proceedings, restraining the debtors from disposing of their property, shall be vacated and annulled." The proceedings in bankruptcy were not to be discontinued until the entire 35 *per cent.* had been paid. By the 8th clause of the resolution it was provided, that one Jones be appointed custodian and special receiver of the property of the debtors, by the bankruptcy Court, but subject to the restriction, that he should not take any of said property into his custody or possession, until the debtors should have defaulted in the payment of one or more of the composition notes. Security in \$10,000, to be given by Jones, was provided for.

The petition of review sets forth, as reasons why the composition was not for the best interest of the creditors: (1.) That it was in deferred payments, and wholly unsecured, and provided for the return of all the property to the debtors on the delivery of the notes, without any security, either that the composition would be paid, or that the debtors would not dispose of all the property before the maturity of any of the notes; (2.) That the debtors were not proper custodians of their assets, because they had fraudulently contracted their debt to Brigg, Entz & Co.; (3.) That the delivery of the property to the debtors placed the composition at the risk of their future business, and compelled the creditors to give up the assets in hand and trust them to the debtors without security; (4.) That, in addition to the dishonesty of Mr. Greig, it appeared that he was mentally unfit to take charge of said property; (5.) That the 8th paragraph of the resolution is in violation of the provision of the statute, and deprives the creditors of the right, in case of default in the payment of any of said instalments, to enforce their original claim, or to

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*In re Samuel Wilson and Thomas Greig, Bankrupts.*

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have recourse to the other provisions of the statute, in the enforcement of the composition, and compels them to assent to the appointment of Jones as receiver, and substantially compels the Court to make such appointment, upon Jones giving a bond in the fixed sum of \$10,000, irrespective of the real amount of the assets which may be on hand at the time of such default.

The point of the objections is, that, the composition being unsecured and payable in instalments, and the property being restored to the debtors, to be dealt with at their pleasure, the composition ought not to be confirmed. The construction of our statute, and of the English statute, which is the same in this respect, has always been, that there is no inhibition against the confirmation of such a composition. (*Ex parte Burrell*, *Laz Rep.*, 1 *Ch. Div.*, 537, 552; *In re Reiman*, 7 *Benedict*, 455, 479; *In re Van Auken*, 14 *Nat. Bkcy. Reg.*, 425; *Ex parte Hamlin*, 2 *Lowell*, 571, 573.) The question is, whether the composition is "for the best interest of all concerned." It may be, although it is unsecured and is payable in instalments, and the property of the debtors is left free to be managed and disposed of by them.

The objection to the composition, taken on the record in the District Court, was, that the composition was "not for the best interest of all concerned," and that it "could not proceed without great injustice and undue delay to the creditors." This general objection is, in the petition of review, formulated under these heads: (1.) Deferred payments; (2.) Unsecured; (3.) Property left in the control of the debtors; (4.) The debtors not proper custodians of the property, because they had fraudulently contracted their debt to Brigg, Entz & Co.; (5.) Mental unfitness of Mr. Greig to take charge of the property. This is the substance of the first four objections stated in the petition of review. The questions involved in them were all questions of policy and expediency, and were all fairly before the creditors. It must be presumed that they considered the objections and yet voted in favor of the composition, by the requisite vote. The register and the

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*In re Samuel Wilson and Thomas Greig, Bankrupts.*

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District Judge approved of the composition, and of its terms. The District Judge, in his decision, (18 *Nat. Bkcy. Reg.*, 101,) considered all the questions in detail, except those relating to the debt to Brigg, Entz & Co., and to the mental unfitness of Mr. Greig, and arrived at the conclusion that the composition was for the best interests of all concerned. In regard to the review of such a decision, it was said, in *In re Wronkow*, (*before cited*;) "It is next insisted that the compromise is not for the best interest of all concerned. The requisite majority of the creditors, at the first meeting, thought it was. The same thing occurred at the second meeting, called specially to consider that very question. The register coincided in the opinion of the creditors, and so reported. The District Court, upon full argument, has decided in the same way. This Court ought not to interfere under such circumstances, unless specific errors in the action of the creditors or the Court below can be pointed out, which, if sustained, would change the judgment. Mere general questions of expediency must ordinarily be considered as settled, when the requisite majority of the creditors, the register, and the District Court all agree. Nothing short of fraud or gross error in judgment should call into exercise the jurisdiction of this Court in such a case. That does not appear here. This Court is simply called upon to decide, upon the whole case, that the creditors and the District Court have come to a wrong conclusion as to what is for the best interest of all concerned." These views are the law of this Court and cover the present case.

The question as to the contracting of the debt to Brigg, Entz & Co., and the question as to the mental fitness of Mr. Greig, were questions arising out of the evidence taken before the register. They were points which either were, or were not, urged before the District Judge, under the general objection filed with the register. If they were urged, they were questions of expediency, and were passed upon. If they were not urged, they might have been, and must, on this review, be regarded as having been waived in the Dis-

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*In re Samuel Wilson and Thomas Greig, Bankrupts.*

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strict Court, so that, because not passed upon by the District Court, they cannot be passed upon by this Court, in review.

As matter of fact, however, I am, on consideration of the evidence, of opinion that the debt to Brigg, Entz & Co. was not fraudulently contracted.

As to Mr. Greig's mental condition, the physician testified, on the 24th of April, that Mr. Greig was not then in a fit mental condition to be examined; that the probabilities of a change of his condition were good, if he had a proper amount of rest; that he was not then fit to carry on business; but that freedom from business anxieties, rest and proper treatment, would be very improving, with a fair prospect, in time, of a restoration of his capacity to attend to business. Seventeen days after that Mr. Greig was examined. No creditor, after that, took any objection as to the mental condition of Mr. Greig, although adjourned meetings were held on seven different days after the 11th of May, and the proceedings were not closed before the register until August 6th.

The entire 8th paragraph of the resolution is in these words: "And, for the purpose of better securing the payment of the several instalments of composition, according to the tenor of the preceding resolutions, we do hereby further resolve, that James W. Jones, of the city of New York, be appointed custodian and special receiver of all the property and estate of the debtors, shown in the statement of debts and assets filed by them at the meeting of creditors at which these resolutions are passed, together with the increase and the profits and the avails thereof; and we do hereby request his appointment by this Court as such receiver; provided, however, and such appointment shall be made subject to this limitation and restriction, that said Jones shall not take any of said property into his custody or possession until the said alleged bankrupts shall have defaulted in the payment of their composition notes, or any of them, as hereinbefore provided to be given; and it is further provided, that the said James W. Jones, before entering upon the duties of his trust as such receiver as aforesaid, shall execute and file in this Court a good and

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*In re Samuel Wilson and Thomas Greig, Bankrupts.*

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sufficient bond, in the penalty of ten thousand dollars, with one or more sureties, to be approved by the Court, conditioned for the faithful performance by said Jones of his duties as such receiver as aforesaid." The 7th paragraph of the resolution provides as follows: "The injunction heretofore granted in these proceedings, restraining the debtors from disposing of their property, shall be vacated and annulled. In all other respects, the proceedings in bankruptcy shall remain as they are now, and shall be deemed to be pending until the composition is completed, for the purpose of any application which the creditors, or any of them, may see fit to make, upon the default of the debtors in the payment of any of the composition notes so to be given as aforesaid." I do not think the 8th paragraph of the resolution violates any provision of the statute, or works any of the results set forth in the 5th objection contained in the petition of review. The provisions of the 8th paragraph are stated therein to be for the purpose of further securing the payment of the several instalments of the composition. Taking the 7th and 8th paragraphs in connection, the creditors are not, in case of default in the payment of any instalment, deprived of any right which they would have had if the 8th paragraph had not been contained in the resolution, nor is the Court prevented from appointing some other person than Jones as receiver, nor from requiring from Jones, or from any other receiver, a bond in such sum as it may deem proper. The 8th paragraph purports to relate only to what shall be done with the property, after default in the payment of some one of the notes. In that regard it looks toward security. Before default, the property is to remain with the debtors, in consonance with the plan of the composition. It would remain with the debtors even without the 8th paragraph. Whether the property be in the hands of the debtors, or in the hands of Jones, or whatever becomes of it, the creditors are not, by the 8th paragraph, deprived of any of the rights which the petition of review alleges they are deprived of. The case of *In re Janeway*, (8 *Benedict*, 267,) is cited. In that case, the composition provided, that, as soon as

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*In re Samuel Wilson and Thomas Greig, Bankrupts.*

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the resolution should be recorded, all the property should revert to the debtors, the same as if no proceedings in bankruptcy had taken place, and that an order of discontinuance might be entered, at the option of the debtors, without further notice to the creditors. The notes were to be deliverable within ten days after the order of confirmation, and, before any note should be given, the property might revert to the debtor, and the proceedings be out of Court. The Court refused to sanction such a composition, on the ground that it was no composition. The present case is not like that. The construction given to the terms of the composition by the petition of review is, that it provides "for the return of all the property to the debtors, upon the delivery of the notes." Such is the proper construction.

The provisions of the 8th paragraph are not of the substance of the composition. They request certain action to be taken by the Court in case of default. The Court is not compelled to comply with the request. It is still free to enforce the composition, or proceed with the bankruptcy, in like manner as if the 8th paragraph were not part of the resolution. These were the views of the District Court, and they are approved.

The prayer of the petition of review, for the reversal of the order of August 20th, 1878, is denied, with costs.

*Alexander Blumenstiel*, for Brigg, Entz & Co.

*Gershom A. Seixas*, opposed.

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Robbins v. The Firemen's Fund Insurance Company of San Francisco.

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HENRY A. ROBBINS AND DANIEL F. APPLETON

vs.

THE FIREMEN'S FUND INSURANCE COMPANY OF SAN FRANCISCO.

R. took out a policy of insurance on merchandise, his own, or held by him in trust or on commission: *Held*, that the insurance was on the merchandise and not on the interest of R. in it, and that parol evidence was inadmissible to show that the intent of the parties to the policy was to insure only the goods of R., or his interest in the goods.

The owner of the property so held on commission by R., and so insured, insured it himself, also: *Held*, that the insurance on such property was double, and that the policy of R. on such property was contributory with the policy of the owner on the same property.

(Before SHIPMAN, J., Southern District of New York, March 27th, 1879.)

SHIPMAN, J. This is a motion for a new trial. Without giving a history in detail of all the facts in the case, the facts which are material upon the decision of this motion are as follows: The American Watch Company, of Waltham, Massachusetts, has been, for many years, a large manufacturer of silver watch cases and of watch movements. Robbins & Appleton, the plaintiffs, were, at the time of the issuing of the policies hereinafter mentioned, and for a long time have been, the sole selling agents of said company, and to this firm the entire production of the company was sent for sale, upon commission. The plaintiffs were factors or agents for no other person or corporation. They also manufactured and sold gold watch cases, upon their own account. Within a year prior to the fire hereinafter mentioned, they procured four policies in different fire insurance companies, in their own names, payable to themselves, whereby they were insured against loss by fire, to the extent of thirty thousand dollars, on "watches, jewelry and other merchandise, their

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Robbins v. The Firemen's Fund Insurance Company of San Francisco.

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own, or held by them in trust or on commission, or sold but not delivered, contained in substantial iron safes, on second floor of brick and iron building, Nos. 1, 3 and 5 Bond Street, New York city." All the premiums of insurance the plaintiffs paid from their own funds. The policy in the defendant company was one of the four, was for \$5,000, and contained the words, "other insurance permitted, without notice." The policy also contained the following provisions: "7. In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, and it is hereby declared and agreed, that, in case of the assured holding any other policy in this or any other company, on the property insured, subject to the conditions of average, this policy shall be subject to average in like manner. Re-insurance, in case of loss, to be settled in proportion as the sum re-insured shall bear to the whole sum covered by the re-insured company. 9. In case of loss on property held in trust or on commission, or, if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth in the proofs of loss, together with their respective interests therein. If this policy is made payable, in case of loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured; unless there has been an actual sale of the property insured. And, further, that it shall be optional with the company to repair, rebuild or replace the property lost or damaged, with other of like kind and quality, within a reasonable time, giving notice of their intention so to do within thirty days after receipt of the proofs herein required. The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same, and, in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing shall be made,

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Robbins v. The Firemen's Fund Insurance Company of San Francisco.

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to ascertain the actual cash value at the time of the fire." At the same time, the plaintiffs, as the agents of the American Watch Company, procured from fourteen companies policies of insurance against fire, in the name of said Watch Company, to the extent of \$80,000, payable to its treasurer, upon watches, watch movements and other merchandise contained in the same safes on the same floor of said building. All these policies were contributory. The premiums were paid by the Watch Company. By a fire which occurred on March 6th, 1877, the plaintiffs' own property in these safes, valued at \$22,000, was damaged to the extent of \$3,000, and the Watch Company's property therein, valued at about \$107,000, was damaged to the extent of \$85,500. Of this loss, \$80,000 were upon watch movements, and \$5,500 were upon silver watch cases. These goods were held by the plaintiffs, at the time of the fire, on commission, for the Watch Company.

The defendant, not denying its liability to the plaintiffs for a proportionate share of their own loss, insisted, that the extent of its liability was \$500, upon three grounds: 1st. That the insurance was upon the plaintiffs' goods alone, or upon the plaintiffs' interest in the property in the safes, and that such was the intent of the parties to the contract, and that extrinsic evidence was admissible to show such intent; 2d. That the procuring policies of insurance in the name of the plaintiffs, upon the goods of the Watch Company, was an unauthorized and voluntary act of the plaintiffs, and was not ratified, prior or subsequent to the fire, by the principals, who, in fact, elected not to adopt the insurance; 3d. That the insurance upon the Watch Company's goods in the name of the plaintiffs was not double insurance, and did not contribute with the policies in the name of the Watch Company, and that, in any event, the plaintiffs could recover, for the benefit of the Watch Company, only the excess of its loss above \$80,000, to wit, \$5,500. The plaintiffs, denying each position of the defendant, contended, upon the second point, that they were authorized to insure, in their own name, the Watch

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Robbins v. The Firemen's Fund Insurance Company of San Francisco.

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Company's property, for its benefit, and that they procured the four policies under and in pursuance of such authority; and that, if not so authorized, the contracts and the policies of insurance had been adopted by the Watch Company. The Court declined to admit parol evidence of the intent of the parties, upon the ground, that, under the conceded facts in the case, the policy was a contract to insure the property in the safes, and not merely the interest of the plaintiffs therein; and that, it being undenied that no property was, or was intended to be, held on commission, except the property of the Watch Company, extrinsic evidence was not admissible to vary the contract; and, furthermore, that the offered evidence, if admissible, did not tend to show a non-intent by the parties to the contract to insure the Watch Company's property.

The Court charged the jury as follows: "Upon the undisputed facts, the legal construction of the policy of insurance is, that the merchandise in the second story safes, whether belonging to Robbins & Appleton, or held by them in trust, or on commission, for the Watch Company, was insured, and that Robbins & Appleton's interest in the property was not simply insured. The insurance was upon the whole property, and not merely upon the plaintiffs' interest in the property. Furthermore, the plaintiffs having insured the property in their own names, and with their own funds, are entitled to receive from the insurance company their own loss in full, and the excess of insurance above the plaintiffs' loss they hold as trustees, for the benefit of their principals, the Watch Company, and the excess of insurance, which, in this case, would be \$27,000, contributes with the policies which were taken out in the name of the Watch Company, provided this and the other policies ever become valid and subsisting policies in which the Watch Company was beneficially interested." Two questions of fact were submitted to the jury, who were instructed as follows: "If you find that this policy was taken out in the name of Robbins & Appleton, in pursuance of and in conformity with the instructions

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Robbins v. The Firemen's Fund Insurance Company

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of the Watch Company previously given you will find for the plaintiffs for the sum interest from August 25th, 1877; but, if policy in the name of Robbins & Appleton was authorized, and was not taken in payment, or was a voluntary act on the part of Appleton, then you will inquire whether the fire, and prior to April 11th, 1877, the Watch Company, for, unless so authorized, is entitled to the benefit of the insurance, and only entitled to recover \$500 and interest. The jury returned a verdict for the plaintiffs, for \$4,400.

1st. The proper construction of the contract. This question has been, in my opinion, submitted to the jury. (See the decision in *Home Ins. Co. v. Baltimore Otto*, 527.) In that case, a policy of insurance was issued by warehousemen, in their own name, upon goods which were the property of the signors, and upon which the bailees had no interest. The language of the policy was: The Home Insurance Company will insure Baltimore Warehouse Company's goods, by fire, to the amount of \$20,000, on condition that the goods are not of a dangerous or extra hazardous nature, their own or held in trust for others, in which they have an interest or liability. The Court said: "The description of the subject-matter is broad as possible. The subject was merchandise contained in a warehouse. It was not restricted to that merchandise. The merchandise of the company, owned by them, was covered, if any other merchandise in the warehouse, in which they had an interest or liability. And so was any merchandise held in trust. The description of the subject-matter changed before it can be held to mean what they contend it means. If, as they claim, only the Warehouse Company had in the merchandise in their warehouse was intended to be insured."

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Robbins v. The Firemen's Fund Insurance Company of San Francisco.

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interest described as the merchandise itself? Why not as the assured's interest in it? Throughout the policy, whenever the subject intended to be insured is spoken of, it is described, not as a partial interest, not as a mere lien for advances and charges upon the goods held in storage, but as the property itself, whatever may be the existing rights to it. \* \* \* \* \* It is undoubtedly the law, that wharfingers, warehousemen and commission merchants, having goods in their possession, may insure them in their own names, and, in case of loss, may recover the full amount of insurance, for the satisfaction of their own claims, first, and hold the residue for the owners. Such insurance is not unusual, even when not ordered by the owners of goods, and, when so made, it inures to their benefit, and such insurance, we must hold, the Warehouse Company sought and obtained by the policy of the plaintiff in error."

The defendant, however, insists that parol evidence was admissible to show that the Watch Company's property was not intended to be insured. When a policy is taken out "for or on account of the owners," or "on account of whomsoever it may concern," the owners not being specified, evidence is often necessary to show who are the owners, or who are intended to be insured thereby, because the contract fails to designate the names of the beneficiaries, and, being silent, the names of the owners must be supplied by extrinsic evidence. So, also, when the insured has property in trust or on commission, belonging to two persons, one of whom is the actual beneficiary of the policy and the other is not, it is competent to show, by extrinsic evidence, whose property was actually intended to be covered by the insurance. For, in this case, the policy is silent as to a material part of the contract. And, where a factor, at the time of the fire, has property in his possession belonging to one person, but, at the time of taking the insurance, and continuously thereafter, both parties to the contract intended that the insurance should be for the benefit of another person, whose property has never been received, in such case the company may show the intent of the factor,

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Robbins v. The Firemen's Fund Insurance Company of San Francisco.

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and that the policy never attached to any property in his possession. In this case, however, it was proved, and not denied, that the plaintiffs were factors for the Watch Company alone, and that, for many years, they had been exclusively factors for that company; and it is not claimed that they contemplated becoming factors for any other person. Property held on commission being specified in the contract, and, at the time of the execution of the contract, and continuously thereafter, the plaintiffs having had in their store, on commission, the property of no one but the Watch Company, it follows, that the policy, so far forth as it relates to property on commission, attached to the property of the Watch Company, or to no property. The effect of the parol testimony would have been to alter the express and unambiguous terms of the written contract.

2d. Did the several policies upon the Watch Company's property constitute double insurance, and were the four policies which were issued in the name of the plaintiffs upon said property, contributory with the policies upon the same property in the name of the Watch Company?

This question has been very fully and ably argued by the defendant's counsel, but I am of opinion that the principles which govern its decision have been authoritatively established in the Baltimore Warehouse Co. case, cited *supra*, although it is obvious that the question which is presented by the facts of this case was not before the Supreme Court. The Warehouse Company held in its warehouse goods belonging to seven depositors. A large portion of this property was destroyed by fire. Previously to, and at the time of, the fire, the company held a policy for \$20,000 in the Home Insurance Company, and another policy, substantially in the same form, for \$10,000, issued by another insurance company. To four of the consignors the Warehouse Company had made advances. Three of the consignors to whom advances had been made had taken out policies, also in force at the time of the fire, in their own names, covering specific portions of said property, and all of the last mentioned policies, except

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Robbins v. The Firemen's Fund Insurance Company of San Francisco.

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two, were made payable, on their face, to the Warehouse Company, in these words: "Loss, if any, payable to the Baltimore Warehouse Company," and were delivered to and held by it as additional security for advances, at the time of making said advances. The insurance company asked the Circuit Court to charge, that "the policies obtained by Hough, Clendening & Co. upon their cotton, and made payable to the Baltimore Warehouse Company, being for a different assured, were upon a different interest from that covered by the policy now in suit, and the latter is not bound to contribute to any losses for which the former are liable." The Circuit Court was of the opinion that the policies in the name of the Warehouse Company covered only its interest in the property contained in the warehouse, and charged that it was entitled to recover for two-thirds of all loss or damage to the property upon which it had made advances, to the extent of its advances on the same, less the amount which the jury should find to be due from the special policies on cotton on which the plaintiff had made advances, made payable to the plaintiff, each of said special policies contributing to the loss on the cotton insured by it, with the general policies held by the plaintiff. The jury found for the plaintiff, and the insurance company brought a writ of error. The Supreme Court said: "The most important question in this case relates to the proper construction of the defendants' policy of insurance. It is contended, on their behalf, that it covered only the Warehouse Company's interest in the goods contained in the warehouse. If this is the true meaning of the contract, the instruction given by the Circuit Court to the jury was erroneous. If, on the other hand, the policy covered the merchandise itself, and not merely the interest which the Warehouse Company had therein, there is no just ground of complaint of the charge of the Circuit Judge." After deciding that the policy covered the merchandise itself, the Court proceeds as follows: "Without pursuing this discussion further, we have said enough to vindicate our opinion, that the policy upon which this suit was brought covered the

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Robbins v. The Firemen's Fund Insurance Company of San Francisco.

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merchandise held by the Warehouse Company on storage, and not merely the interest of the bailees in that property. It follows, necessarily, that there was double insurance. The policy issued to the Warehouse Company, and those obtained by the depositors of the merchandise, covered the same property, and they were for the benefit of the same owners. The persons assured were the same; for, if the policies taken out by Hough, Clendening & Co. were upon their goods, notwithstanding the memorandum that the loss, if any, was payable to the Baltimore Warehouse Company, as may be conceded was the case, so was the policy now in suit. The insurers are liable, therefore, *pro rata*, each contributing proportionately." It is true, that the Court did not pass upon the question whether the policy in suit contributed with the policies which were not made payable to the Warehouse Company, for that question was not before the Court. The only point which the Court decided, in this part of the case, was, whether two policies upon the same interest in the same property, one issued to the bailees and owners and made payable to the bailees, and the other issued to the bailees, constituted double insurance. The principle upon which the Court placed its decision in favor of double insurance is, that these two classes of policies covered the same interest in the same property, and were for the benefit of the same owners. Where these two facts exist, double insurance is the result. Lord Mansfield defined double insurance to be, "when the same man is to receive two sums instead of one, or the same sum twice over for the same loss, by reason of his having made two insurances upon the same goods on the same ship," (*Godin v. London Assurance Company*, 1 Burr., 489, 495;) but it is not essential that the respective policies should be issued to the same persons. If the policies, though issued to different persons, cover the same interest, and inure to the benefit of the same owner, the insurance is double. If the policies are issued to different persons, in respect of different rights, as, for example, to mortgagor and mortgagee, or do not inure to the benefit of the same owner, the insurance is

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Robbins v. The Firemen's Fund Insurance Company of San Francisco.

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not double. And here consists the distinction between the case of *North British Ins. Co. v. London Ins. Co.*, (*L. R.*, 5 *Ch. Div.*, 569,) which is relied upon by the defendant and the Warehouse Co. case. In the English case, Barnett & Co., wharfingers, who, by the custom of London, or of the trade, were responsible to their consignors, like common carriers, and were liable to make good loss by fire, effected insurance in their own name, to a large amount, on property, "the assured's own, in trust or on commission, for which they are responsible," in their warehouse. The policies contained a contributory clause. A fire destroyed property of one of the consignors, who had insured in their own names in other companies. Barnett & Co. were paid their insurance and paid the consignors the amount of their loss. The wharfingers' insurers claimed contribution from the consignors' insurers, and whether the whole insurance was double and contributory was the question in an equity suit between the two sets of insurers. It was held that the insurance was not double. The different Judges place the stress of their argument upon the fact, that the wharfingers were liable as common carriers, and construe the contract to be an insurance to protect them against loss arising from this liability. The two classes of insurance were considered to be upon different interests, although upon the same property. In the Baltimore Warehouse case the Court gave a different construction to the contract.

It results, then, from the fact that the Robbins & Appleton policies, so far forth as they related to the Watch Company's property, were upon the same property which was insured in its name, and from the further fact, that the two sets of policies upon the Watch Company's goods were for the benefit of the same owner, (for, as to the insurance upon the property of the Watch Company, in the plaintiffs' policies, they were trustees for the owner,) that the insurance was double and contributory. The plaintiffs' policies upon the Watch Company's property present the ordinary case of insurance, by a factor, of goods in his possession belonging

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Robbins v. The Firemen's Fund Insurance Company of San Francisco.

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to another person. Such insurance, either directly or indirectly, inures to the benefit of the owner. In this case, the insurance was directly for the benefit of the owner, as the factors had no charges or liens upon the goods. The fact that the plaintiffs' policies covered goods which were their own, and were not in the Watch Company's policies, does not take the insurance upon the company's goods out of double insurance, for, this circumstance does not alter the fact that the insurance upon the Watch Company's goods was entirely for its benefit. The two classes of property were perfectly distinct and separate, and the ascertainment of the amount due upon account of the Watch Company was merely a matter of arithmetical computation.

The defendant also asks that a new trial should be granted upon the ground that the verdict was contrary to the evidence. Two questions of fact were submitted to the jury: 1st. Was the insurance unauthorized? 2d. If unauthorized, was it adopted? The jury found for the plaintiffs generally. In the present condition of the litigation of the plaintiffs with their insurers, (another suit now awaiting trial in this Court,) I do not think it advisable to discuss the questions of fact, except simply to say, that the state of the evidence was not such as to warrant the granting a new trial.

The motion for a new trial is denied.

*Leon Abbett*, for the plaintiffs.

*Joshua M. Van Cott* and *John Winslow*, for the defendant.

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The United States v. Morris.

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## THE UNITED STATES vs. JAMES MORRIS.

An indictment under § 5,463 of the Revised Statutes of the United States, which charges a person with having forged a material endorsement on a Post Office money order, with intent to defraud C., charges what is an offence against the United States.

(Before BENEDICT, J., Southern District of New York, March 29th, 1879.)

BENEDICT, J. The prisoner was indicted, under section 5,463 of the Revised Statutes of the United States, charged with having forged a material endorsement upon a Post Office money order, with intent to defraud C. M. Cady. A verdict of "guilty" was rendered, and now the defendant moves in arrest of judgment, upon the ground, that, inasmuch as the indictment charges the intent to have been to defraud C. M. Cady, no offence against the United States is stated. There is nothing in the point. If the United States has power to issue Post Office money orders, which has not been doubted, it has, as an incident to that power, authority to protect such orders against fraud. It would, doubtless, therefore, be competent for Congress to make it an offence against the United States to forge a money order, whether done with or without an intent to defraud. This statute makes an intent to defraud one of the elements of the offence, but the fact, that, in this instance, the intent charged was to defraud C. M. Cady, does not change the character of the act. It was still an act which the United States has the authority to punish, for the better protection of money orders lawfully issued by the United States. In *United States v. Shellmire*, (1 *Baldwin*, 370, 377,) it is said, that an indictment for forging an order upon the Bank of the United States, with intent to defraud a private person, would lie, in the Courts of the United States.

The motion in arrest is denied.

*C. P. L. Butler*, (Assistant District Attorney,) for the United States.

*Henry W. Sackett*, for the defendant.

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Alcott v. Young.

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CHARLES W. ALCOTT AND CATHERINE C. MAGEE

vs.

JOSEPH YOUNG. IN EQUITY.

The letters patent granted to J. Wesley Webber, August 17th, 1869, for an "improved kindling wood," the claim thereof being, "The accompanying or fastening one or more fire-lighters, A, to or with the bundle of the common article of manufacture known as bundle or kindling wood, the fire-lighter to be suitably moulded or pressed, and to be made of a combustible material, such as resin or tar, the ingredients of which I do not claim, my invention consisting wholly of accompanying or fastening a fire-lighter, A, to or with the bundle, or at the string, B, of the bundle of the common article of manufacture known as bundle or kindling wood," are void for want of patentable invention.

(Before BLATCHFORD, J., Southern District of New York, March 31st, 1879.)

BLATCHFORD, J. On the 17th of August, 1869, letters patent of the United States were granted to J. Wesley Webber for "a new and useful improved kindling wood." The specification states, that the invention is "a new improvement, consisting of accompanying or fastening one or more fire-lighters to each bundle of the common article of manufacture known as "bundle or kindling wood," (see drawing marked C,) having for its object, to facilitate the lighting or ignition, by means of the said fire-lighter, of wood, thus saving the consumer the labor of chopping the wood in fine pieces." It further states, that the nature of the "invention or improvement consists in accompanying or fastening one or more fire-lighters, A, in a suitable manner, or to the string of the bundle of the common article of manufacture known as bundle or kindling wood, marked C, in the accompanying drawing." The claim is in these words: "The accompanying or fastening one or more fire-lighters, A, to or with the bundle of the common article of manufacture known as bundle or kindling wood, the fire-lighter to be suitably moulded or pressed, and

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Alcott v. Young.

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to be made of a combustible material, such as resin or tar, the ingredients of which I do not claim, my invention consisting wholly of accompanying or fastening a fire-lighter, A, to or with the bundle, or at the string, B, of the bundle of the common article of manufacture known as bundle or kindling wood." The drawing represents a cylindrical bundle of kindling wood, consisting of some 50 pieces of substantially uniform length, confined by a string tied around the circumference, and with a fire-lighter fastened to the string. The plaintiffs, as owners of the patent, have filed a bill in equity against the defendant, founded on an alleged infringement of the patent, for an injunction and an account. The defendant has answered the bill. The answer avers, that the defendant is making and selling bundle kindling wood, and that he puts into each bundle so made and sold by him, a kindler made under letters patent of the United States granted to Frederick D. Cordes and André Geiger, October 31st, 1876, for an "improvement in fire kindlers." It also alleges, that the invention patented was not in fact patentable, or the subject-matter of invention. The Cordes and Geiger patent is for an invention made by Cordes, which consists in making the fire kindler "of a bundle of parallel pieces of straw, or other tubular palms, which are filled and covered with melted resin, pitch, or other easily combustible material." The defendant inserts his kindler in the bundle, either next the string or in the body. The plaintiffs now apply to the Court for a preliminary injunction, to restrain the defendant from infringing the Webber patent, by further making and selling what he has so made and sold.

In April, 1875, James Carrick & Co., being the owners of the said Webber patent for the city and county of Baltimore, in the State of Maryland, brought a suit in equity in the Circuit Court of the United States for the District of Maryland, against James A. Hooper, Jr., alleging that said Hooper had infringed said patent by making and selling bundles of kindling wood with fire-lighters, arranged in the manner claimed in said patent, and praying relief. In May, 1875, the defendant answered the bill, setting up, as the only defence, non-

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Alcott v. Young.

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infringement. An amended answer was filed in November, 1876, denying the novelty of the invention, and giving the names of prior users of it, and averring its public use and sale in this country for more than two years prior to Webber's application for a patent for it, and denying infringement. Neither answer set up that the invention was not patentable, or the subject-matter of invention. The Court, on January, 7th, 1878, entered a decree for the plaintiffs, for an account of profits and damages, and made a reference to a master to take such account. The decree declared the patent to be good and valid, and awarded a perpetual injunction. The master, by his report, made March 25th, 1878, after hearing evidence, and being attended by both parties, reported, that the defendant had made no profit from his business of selling bundle kindling wood, but had incurred a loss in conducting the same; that he had carried on the business of selling bundle kindling wood in Baltimore city, and had made three kinds, namely, (1) plain, (2) dipped, and (3) with a fire-lighter inserted in the bundle; that the plain was not claimed to be an infringement; that he had made 100,000 bundles of No. 2, and 50,000 of No. 3; that it appeared that the royalty paid in New York by those doing business under the Webber patent, was 5 cents per 100 bundles; that that was a proper sum to allow for a royalty in Baltimore; that, if the Court should find No. 2 to be an infringement, the plaintiffs would be entitled to recover \$50 therefor; and that, if the Court should find No. 3 to be an infringement, the plaintiffs would be entitled to recover \$25 therefor. On the 18th of May, 1878, the Court made an order that the report assessing the damages at \$75 be confirmed, with costs.

It is shown, on the part of the plaintiffs in this case, that Alcott, one of the plaintiffs in this case, has been receiving royalty for the use of the invention for more than 4 years; and that Alcott's firm made and sold, in 1875, an average of more than 20,000 bundles a week, of bundle kindling wood made under the Webber patent. The advantages of it are set forth to be, that it can be kindled without shavings or

paper; that it saves the necessity of splitting any of the wood fine; that it is convenient and economical, as it furnishes the appropriate amount of kindler to each separate bundle; that it is always ready and only requires a match to kindle it; that, since its introduction, it has been very difficult to sell the ordinary bundle kindling wood to those who have used the kindling wood with the fire-lighter in the bundle; and that, when the wood is sold without the fire-lighter, it can only be sold at a considerably less price than the bundles made under the Webber patent.

The specification of the Webber patent states, that the invention consists merely in fastening the fire-lighter to the bundle of kindling wood, or accompanying the bundle of kindling wood with the fire-lighter. It refers to the bundle of kindling wood as a common article of manufacture. Nothing is claimed as new in regard to the construction, or composition, or shape, or manufacture of the fire-lighter. Any old fire-lighter may be used as the fire-lighter of the patent. The ingredients of the fire-lighter are disclaimed. All that is necessary, in respect to the fire-lighter, is, that it should be suitably moulded or pressed, and be combustible and capable of setting fire to the wood.

I do not think that the subject-matter of the claim is a patentable invention. On the part of the plaintiffs, it is sought to distinguish this case from cases in which inventions have been held not to be patentable, by the contention, that, in this case, the uniting of the fire-lighter with the bundle of kindling wood contributes towards the common result of lighting a fire, and that expense is saved and convenience is promoted. It may be true, that, as a matter of trade, a bundle of kindling wood with a fire-lighter inserted in it, or attached to it, will sell more readily than a bundle of kindling wood alone, or than a bundle of kindling wood separately and a fire-lighter separately; and that a bundle of kindling wood with a fire-lighter inserted in it, or attached to it, will bring a higher price than a simple bundle of kindling wood. It may also be true, that the Webber bundle has the advan-

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Alcott v. Young.

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tages in use that are claimed for it. But, there is no patentable invention in accompanying the bundle with the kindler, by attachment or insertion. It might as well be claimed, that it was a patentable invention to tie a match to a cigar, or a straw for drinking to a drinking glass, or a fork to a can of food. The case is not unlike that of *Langdon v. De Groot*, (1 *Paine*, 203,) where the claim of the patent consisted in folding thread and cotton into skeins or hanks of a convenient quantity for retailing, with a sealed wrapper around the same, and a label containing the number and description of the article. The invention was held not to be patentable. In the present case, the purchaser of the Webber bundle gets a bundle of kindling wood and a fire-lighter. He gets no more than if he purchased the two separately. If he purchases a given number of plain bundles of kindling wood and an equal number of fire-lighters, and has them in his house to be used, one fire-lighter with one bundle of kindling wood, he would infringe this patent, if he should tie the former to the latter or insert the former in the latter. No such result can be admitted. The mere aggregation of the two things is not a patentable combination. Until the kindler is lighted there is no joint result consequent on the aggregation of the two. The lighting or combustion of the Webber kindler presents nothing new, in contrast with the lighting or combustion of a kindler which was never tied to or inserted in the bundle.

It does not appear that the question was distinctly considered in the case in Maryland. There are numerous cases in the Courts of the United States which show that there is not a sufficiency of invention in this case to support the patent. (*Knight v. R. R. Co.*, *Taney's Decisions*, 106; *Bean v. Smallwood*, 2 *Story*, 408; *Winans v. R. R. Co.*, *Id.*, 412; *Hotchkiss v. Greenwood*, 11 *How.*, 248; *Phillips v. Page*, 24 *Id.*, 164; *Jones v. Morehead*, 1 *Wall.*, 155; *Stimpson v. Woodman*, 10 *Id.*, 117; *Hicks v. Kelsey*, 18 *Id.*, 670; *Hailes v. Van Wormer*, 20 *Id.*, 353; *Rubber Tip Pencil Co. v. Howard*, *Id.*, 498; *Smith v. Nichols*, 21 *Id.*, 112; *Milligan & Higgins Glue Co. v. Upton*, 6 *Off. Gaz. of Pat. Off.*, 837;

## Nelson v. McMann.

*Brown v. Piper*, 1 *Otto*, 38; *Reckendorfer v. Faber*, 2 *Id.*, 347; *Needham v. Washburn*, 7 *Off. Gaz. of Pat. Off.*, 649; *Dunbar v. Myers*, 4 *Otto*, 187; *Mahn v. Harwood*, 14 *Off. Gaz. of Pat. Off.*, 859.) The English cases are to the same effect. (*Brunton v. Hawkes*, 4 *B. & A.*, 541; *Saunders v. Aston*, 3 *Barn. & Ad.*, 881; *Losh v. Hague*, *Webst. P. C.*, 202; *Kay v. Marshall*, 8 *Cl. & Fin.*, 245; *Bush v. Fox*, 5 *H. of L. Cases*, 707; *Tetley v. Easton*, 2 *C. B., N. S.*, 706; *Brooks v. Aston*, 8 *E. & B.*, 478; *Envelope Co. v. Seymer*, 5 *C. B., N. S.*, 164; *Ralston v. Smith*, 9 *Id.*, 117 and 11 *Id.*, 471; *Horton v. Mabon*, 12 *Id.*, 437; *Orenson v. Clarke*, 13 *Id.*, 337 and 14 *Id.*, 475 and 11 *H. of L. Cases*, 223; *Harwood v. Railway Co.*, 11 *Id.*, 654; *Jordan v. Moore*, *L. R.*, 1 *C. P.*, 624; *Penn v. Bibby*, *L. R.*, 2 *Ch. App.*, 126; *Fox v. Dellestable*, 15 *W. R.*, 194; *White v. Toms*, 17 *Law Times Rep., N. S.*, 348; *Parke v. Stevens*, *Law Rep.*, 8 *Eq.*, 358 and 5 *Ch. App.*, 36; *Rushton v. Crawley*, *Law Rep.*, 10 *Eq.*, 522.)

The motion for an injunction is denied.

*Warren G. Brown*, for the plaintiffs.

*Edward Fitch*, for the defendant.

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CHARLES NELSON

vs.

THOMAS R. McMANN AND EDMUND RUSSELL. IN EQUITY:

A mere licensee under a patent cannot sue, in equity, for the infringement of his rights under the patent, without joining with him, as plaintiff, the owner of the legal title, and such owner is, in such case, a proper party.

What constitutes a mere licensee, defined.

The instrument under which the plaintiff in this case claimed his rights, held to be only a license.

(Before BLATCHFORD, J., Southern District of New York, April 2d, 1879.)

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Nelson v. McMann.

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BLATCHFORD, J. The bill in this case is founded on reissued letters patent of the United States, granted to Nathaniel Jenkins, August 3d, 1869, for an "elastic packing for joints and valves exposed to destructive fluids." The original patent was granted to Jenkins, May 8th, 1866. The specification of the reissued patent describes the new packing as "an elastic packing, of indestructible properties, to a valve, joint or aperture through which a destructive fluid is to pass, such as steam of any kind, hot water, kerosene or other coal oil, hot or cold." The bill alleges, that Jenkins, by an instrument in writing, dated February 1st, 1870, assigned and conveyed to the plaintiff "the exclusive right and license, within the States of New York and New Jersey, to use said elastic packing in the manufacture of any and all manner of valves, cocks and other articles in which said elastic packing could or should be used, and sell for use in said territory and elsewhere in the United States, such valves, cocks, &c., so manufactured." It also alleges, that, under such rights, the plaintiff made and sold "valves, cocks and other articles containing said elastic packing." It also alleges, as an infringement, that the defendants did, in New York and New Jersey, "use and vend to others to be used the aforesaid invention and discovery, and did cause the same to be done, and did make, use, and vend to others to be used, valves, cocks and other articles employing and containing said improved elastic packing."

To this bill the defendants interpose a plea, which sets forth, "that the said Charles Nelson is not, and never has been, the assignee of the said letters patent in said bill set forth, or of any territorial grant under the same, in manner and form as set forth in said bill, and that the said letters patent are now the exclusive property of Thomas William Clarke of Boston, in the county of Suffolk, and State of Massachusetts, under the following claim of title: The said Nathaniel Jenkins died, on or about the twentieth day of May, 1872, leaving a will duly probated in said county of Suffolk, in the probate Court thereof, whereof Charles F. Jenkins, Alfred W. Chandler and John Hassam were executors, and came into full

possession of said letters patent. The said Charles Jenkins, Alfred W. Chandler and John Hassam, executors as aforesaid, on the——day of——, 1874, duly assigned said letters patent to Alfred B. Jenkins, under power contained in said will, and thereby conferred upon them. The said Alfred B. Jenkins, on the fifth day of November, 1874, duly assigned the same to said Thomas William Clarke. \* \* \* Wherefore defendants say, that the title to said letters patent is not in the said Charles Nelson, for the States of New York and New Jersey." The plaintiff takes issue on this plea, by a replication.

Proofs have been taken by both parties, and the case has been brought to a hearing thereon. The real question tried and argued has been, whether the plaintiff has a right to maintain this suit in his own name alone, as it is now brought. The bill does not aver that the plaintiff is or has been the assignee of the patent or of any territorial grant under the same. Therefore, the plea, in denying that, denies what is not averred in the bill. The allegation of the bill as to the right and license conveyed to the plaintiff by Jenkins, by the instrument of February 1st, 1870, is not otherwise denied by the plea. The parties have, however, treated the pleadings and proofs as raising the question, whether the plaintiff has such a title to, or under, the patent as authorizes him to bring this suit in his own name alone; and that is the question which will be considered.

On the 1st of February, 1870, Jenkins owned two other patents which had been granted to him, besides the reissued patent of 1869. That reissue will be called the 1869 patent. The 1869 patent was for a packing composed of refractory earth and vulcanized rubber. Of the other two patents, one, granted October 15th, 1867, was for a packing for joints and valves composed of pulverized mica and vulcanized rubber, or one composed of pulverized wood charcoal and vulcanized rubber. The other patent was granted October 6th, 1868, and was for an "improvement in steam globe valves," of that class in which an elastic or semi-elastic packing could be em-

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Nelson v. McMann.

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ployed, the packing being in an annular chamber in the valve head. Premising this, the instrument of 1870 was made. It contains these provisions: "Whereas said Jenkins is the proprietor of certain inventions in the construction of stop valves, cocks, &c., and in packing or discs for stop valves, cocks and other purposes; and whereas the said Jenkins has entered into an arrangement with said Nelson to license him to manufacture stop valves, cocks, &c., under his patent dated October 6th, 1868, and also other valves, cocks, &c., of a suitable pattern to employ his said patent packing or discs, and said Nelson does agree to pay to said Jenkins certain royalties on the valves, cocks, &c., so made by him, and to conduct the manufacture and sale of said valves, cocks, &c., in a manner that will insure the best results to the parties herein named: Now, therefore, said Jenkins does hereby authorize, empower and license the said Nelson to manufacture and sell valves, cocks, &c., of any and every kind, name and description, for any and every purpose, according to his said letters patent, dated October 6th, 1868, and does also authorize and empower said Nelson to make any and every other valves, cocks, &c., not constructed according to said letters patent, which can be suitably arranged for employing the Jenkins patent packing or discs, without making the said Jenkins liable for any infringements of letters patent on valves, cocks, &c., taken out by any other party or parties; and said Jenkins does hereby covenant and agree to and with said Nelson, that he will sell and promptly supply all his orders for the patent packing or discs, such as are to be used in the construction of the valves, cocks, &c., so made by him or for him, at a discount of twenty (20) *per cent.* from the latest list of prices of such packing or discs, advertised or circulated by him, a copy of which said list is hereunto annexed, in order to show the prices at this date;" (here follows the list of prices of packing or discs;) "and the said Jenkins does also covenant and agree, to and with the said Nelson, that he will not hereafter grant any authority or license to any person or persons to manufacture, within the States of New York and

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Nelson v. McMann.

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New Jersey, any valves, cocks, or any article in which shall be used the Jenkins patent packing or discs, but that said Nelson shall have the exclusive right to manufacture, within the States of New York and New Jersey, any valves, cocks, or any other article, under said letters patent, dated October 6th, 1868, or renewed patents, or patents for improvements thereon; and said Nelson agrees to pay a royalty for any article he may manufacture, not within specified, in which the said packing is used, the royalty to be fixed upon when such article, not specified, is manufactured; and said Nelson shall have the right to sell in any of the United States, valves, cocks, or any other article, manufactured under said letters patent, or renewed patents, or patents for improvements thereon; and, for and in consideration of the same, the said Nelson does hereby agree with the said Jenkins, his executors, administrators, and the assigns of said Jenkins, of said patents for valves and packing, that he will make the business of manufacturing and selling the Jenkins patent compression valves and gauge cocks a specialty, that he will endeavor to introduce them into use in preference to any other valve or gauge cocks, and recommend them as a superior article, and that he will manufacture them of good material, and equal in weight and workmanship to those heretofore manufactured by him; and said Nelson also agrees to thoroughly advertise said valves and cocks, so to be made by him or for him, and bring them thoroughly to the attention of persons using and employing valves and cocks, and that he will purchase all the packings or discs required for such valves and gauge cocks, from said Jenkins or his legal representatives, or those owning said patents, at the aforesaid rates, viz., at a discount of twenty (20) per cent. from the latest list prices, and that he will pay to said Jenkins, his executors, administrators, or those owning said patent of October 6th, 1868, a royalty at the following rates, for each and every valve made and sold;" (here follows a tariff of royalty on each valve, according to its inches of opening, and on every gauge cock sold) "and said Nelson does

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Nelson v. McMann.

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hereby agree to stamp, or have stamped, each and every valve made by him, or for him, under said letters patent, as follows: 'Patented, Oct. 6th, 1868—May 8th, 1866, reissued Aug. 3d, 1869—Oct. 15th, 1867;' and said Nelson further agrees to account, at the end of each and every month, for the valves and cocks, or any other article sold by him, or for him, since the last account rendered, specifying the sizes, and the number of each size, and articles sold, and to pay to said Jenkins, his executors, administrators or assigns of his said letters patent, the sum of money due under this agreement, and according to such account, forthwith; and it is mutually understood and agreed, that the said Nelson may sell, transfer, or convey this right or license to any member or members of his firm, now or hereafter engaged in the carrying on of business with him, and that, in case of the death of said Nelson, this license or right shall descend to the survivor or survivors, or the administrators of the deceased, who shall possess all the rights and privileges guaranteed to said Nelson by this agreement, and such administrators may sell such right or license to any parties in the said firm, but neither the said Nelson, nor the administrators of said Nelson, nor any member or members of his firm, shall have any right to assign this right or license to any others than those now engaged, or those who may hereafter be engaged, in business with said Nelson, without first obtaining a written consent of said Jenkins, his executors, administrators, or assigns of his said letters patent; and said Jenkins further agrees, that this agreement shall subsist for the term of said letters patent, and that it shall be binding on the lawful possessors of the said letters patent for said packing, dated May 8th, 1866, reissued August 3d, 1869, and dated October 15th, 1867; and the said Nelson agrees that this agreement shall subsist during the term of said letters patent, and shall be binding on him, his executors, administrators and assigns."

The scope and meaning of the provisions of this agreement are very plain. Jenkins had a patent for valves and two patents for packing. The valves were such as could em-

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Nelson v. McMann.

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ploy the patented packing. The patented packing could also be used in other valves, not covered by the 1868 patent. Jenkins desired to retain in his own hands the manufacture of the packing, and to sell it. He desired to create a market for it. He could do so by promoting the manufacture and sale of valves made according to his 1868 patent, which would require the patented packing, and of other valves which would require it. By licensing the manufacture of valves to be made according to his 1868 patent, he could derive a royalty on each valve, and at the same time obtain a profit on the manufacture and sale by himself of the packing to be used in such valve. He would also be able thus to ensure that the packing should be a satisfactory article. He, therefore, licenses Nelson to make and sell valves under the 1868 patent, and other valves which could employ the packing of the 1867 and 1869 patents, without making him (Jenkins) liable for infringing any patents for such other valves. He agrees to sell to Nelson, for use in such valves, packing made under the 1867 and 1869 patents, at specified prices. He agrees not to license any one to make in New York and New Jersey any article in which the packing of the patents of 1867 or 1869 shall be used. He agrees that Nelson shall have the exclusive right to make in New York and New Jersey any article under the 1868 patent. Nelson agrees to pay a specified royalty on every valve made and sold according to the patent of 1868, and a specified royalty on every gauge-cock sold according to that patent, and on every other article he should make, not specified, in which such packing should be used, a royalty to be thereafter fixed. Nelson is to have the right to sell anywhere in the United States any article he may make under the 1868 patent. He agrees to purchase from Jenkins all the packing required for such valves and gauge-cocks, at the prices specified. He agrees to stamp every valve made by him or for him under the 1868 patent, with the dates of all three of the patents. He agrees to account to Jenkins every month for all articles sold by him under the agreement, and to pay forthwith the

then to use it for any purpose for which it could be used. The fact of sale carried with it a license to use and a license to sell again. The instrument conveys to Nelson no right to make packing under either of the packing patents. The royalty to be paid is to be paid solely under the patent of 1868 and for a license under it. There is no royalty to be paid under either of the packing patents. The packing is to be bought from Jenkins as an article of merchandise, at a specified price, and Nelson agrees to buy from Jenkins all the packing he, Nelson, is to use. The valves made according to the patent of 1868 are to be stamped with the dates of all three of the patents, because the valves are made by Nelson under the patent of 1868, and the packing in them is made by Jenkins under the packing patents. Whether the instrument gives to Nelson, as against the owners of the packing patents, an exclusive right to use the patented pack-

ing in New York and New Jersey, is a question not necessary or proper to be decided in this case. At most, the instrument is, as to the patent sued on, a mere license.

It was provided by § 11 of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 121,) which was the statute in force when the 1868 and 1869 patents were granted, and when the instrument of February 1st, 1870, was made, that "every patent shall be assignable in law, either as to the whole interest, or any undivided part thereof, by any instrument in writing, which assignment and also every grant and conveyance of the exclusive right under any patent, to make and use, and to grant to others to make and use, the thing patented, within and throughout any specified part or portion of the United States, shall be recorded in the Patent Office within three months from the execution thereof." The 14th section of the same Act provided, that an action at law for damages for infringement might be brought "in the name or names of the person or persons interested, whether as patentees, assignees, or as grantees of the exclusive right within and throughout a specified part of the United States." The 17th section of the same Act gave original cognizance "as well in equity as at law" to all the Circuit Courts of the United States, of "all actions, suits, controversies, and cases" arising under any patent law, and gave power to such Courts, "upon bill in equity filed by any party aggrieved, in any such case, to grant injunctions, according to the course and principles of Courts of equity," to prevent infringements. Under these provisions it was always held, that no mere licensee could bring a suit for infringement, either at law or in equity, in his own name alone. In *Gayler v. Wilder*, (10 *Howard*, 477, 494,) it is said, that while, by the 14th section of the Act of 1836, the patentee may assign his exclusive right within and throughout a specified part of the United States, and the assignee may, upon such an assignment, sue in his own name, for an infringement of his rights, yet, in order to enable him to sue, the assignment must convey to him the entire and unqualified monopoly which the patentee held in the territory

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Nelson v. McMann.

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specified, excluding the patentee himself as well as others; and that any assignment short of this is a mere license. That was a suit at law. Wilder, the assignee of the whole of the patent, had granted to one Herring the exclusive right to make and vend the patented article, a safe, in the city and county of New York, for a royalty of a cent a pound on each pound the safe might weigh. But Wilder reserved the right to set up a manufactory for making the safes in the State of New York, not within fifty miles of the city, and to sell them in the State of New York, paying to Herring a cent a pound on each safe so sold within the State. The Supreme Court held that the agreement was "not an assignment of an undivided interest in the whole patent, nor the assignment of an exclusive right to the entire monopoly in the State or city of New York;" that it, was, therefore, "to be regarded as a license only," and did not, under the statute, enable Herring to maintain an action for infringement; that Wilder continued to be the legal owner of the patent; and that the suit was properly brought in the name of Wilder. The same view was held by Mr. Justice Nelson and Judge Ingersoll, in the Circuit Court of the United States for the District of Connecticut, in *Potter v. Holland*, (4 *Blatchf. C. C. R.*, 206, 211.) If, within the foregoing principles, the plaintiff in this suit is only a licensee, he cannot sue in equity without joining with him as plaintiff the owner of the legal title, (*Curtis on Patents*, 3d ed., § 403;) and such owner is, in such case, a proper party. (*Woodworth v. Wilson*, 4 *Howard*, 712.) A suit at law is, in such case, properly brought in the name of such owner, in behalf of the licensee. (*Goodyear v. McBurney*, 3 *Blatchf. C. C. R.*, 32; *Goodyear v. Bishop*, 4 *Id.*, 438.) These principles are recognized in *Littlefield v. Perry*, (21 *Wallace*, 205, 219, 223,) and there is nothing in that case which favors the right of the plaintiff in this case to sue alone. The Court in that case say: "A mere licensee cannot sue strangers who infringe. In such case redress is obtained through or in the name of the patentee or his assignee."

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Nelson v. McMann.

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The 36th section of the Act of July 8th, 1870, (16 *U. S. Stat. at Large*, 203,) provides, that every patent or any interest therein shall be assignable in law, by an instrument in writing; and the patentee, or his assigns or legal representatives, may, in like manner, grant and convey an exclusive right, under his patent, to the whole or any specified part of the United States." This provision is not different from that found in § 11 of the Act of 1836, and is now embodied in § 4,898 of the Revised Statutes. The "exclusive right," under a patent, to a specified part of the United States, means an exclusive right to do everything under the patent, in such specified part, which the patentee could do, and is the same thing as the "exclusive right," under the patent, "to make and use, and to grant to others to make and use, the thing patented, within and throughout" such specified part. Section 55 of the Act of 1870 contains the same provisions, in substance, which are above cited from § 17 of the Act of 1836, and they are now embodied in sections 629, 711 and 4,921 of the Revised Statutes. Section 59 of the Act of 1870 provides, that an action at law for damages for infringement may be brought "in the name of the party interested, either as patentee, assignee or grantee." This means such a grantee as is referred to in § 36 of the Act of 1870, and no other grantee than such as is spoken of in § 14 of the Act of 1836. The provision above cited from § 59 of the Act of 1870 is now embodied in § 4,919 of the Revised Statutes. There is no ground for saying that the scope of the Act of 1870 is greater than that of the Act of 1836.

Applying the foregoing interpretation of the law to the provisions of the instrument under which the plaintiff claims the right to bring this suit in his own name alone, it is entirely clear that he has no such right, because he has not the title to the patent for any part of New York or New Jersey, which is the defence set up in the plea. Even if the agreement between Jenkins and Nelson gave to Nelson such an exclusive right and license to use the packing of the reissue



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Cissel v. McDonald.

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the plaintiff now moves to remand the cause to the State Court, on the ground that this Court has no jurisdiction to entertain it. The Constitution of the United States, (*art. 3, sec. 2,*) provides, that the judicial power of the United States shall extend to controversies between the citizens of a State and foreign citizens or subjects. This is the only grant of jurisdiction over cases to which foreign citizens or subjects are parties. The distinction between the District of Columbia and a State is clearly recognized in *art. 1, sec. 8,* of the Constitution. The ground taken by the plaintiff is, that he is not a citizen of a State, being only a citizen of the District of Columbia.

The 11th section of the Judiciary Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 78,) gave original cognizance to the Circuit Courts, of all suits of a civil nature, involving more than \$500, exclusive of costs, where "an alien is a party." Section 12 of the same Act provided, that if a suit should be "commenced in any State Court against an alien," involving more than \$500, exclusive of costs, it might be removed into the Circuit Court of the United States. Such provision of section 11 is embodied in subdivision 1 of section 629 of the Revised Statutes, and such provision of section 12 is embodied in subdivision 1 of section 639 of the Revised Statutes. The provision of section 11 came before the Supreme Court, for construction, in 1800, in *Mossman v. Higginson*, (4 *Dallas*, 12,) where it appeared that the plaintiff was a British subject, but it did not appear that the defendants were citizens of the United States. The Court said, that the section must receive a construction consistent with the Constitution, and that, although the statute said, in general terms, that the Circuit Court should have cognizance of suits where "an alien is a party," yet, the legislative power of conferring jurisdiction on the Federal Courts, was, in this respect, confined to suits between citizens and foreigners. In *Jackson v. Twentyman*, (2 *Peters*, 136,) in 1829, the plaintiff was alleged to be a subject of the King of Great Britain, but no citizenship of the defendants was alleged, and



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Cissel v. McDonald.

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1804, it was held, that a Circuit Court had no jurisdiction of a suit between a citizen of the District of Columbia and a citizen of a State, because a citizen of the District of Columbia was not a citizen of a State. The question arose under that clause of § 11 of the Act of 1789 which gave original jurisdiction to the Court, of a suit "between a citizen of the State where the suit is brought and a citizen of another State." This ruling was followed in *Westcott v. Fairfield*, (*Peters' C. C. R.*, 45,) in 1811. In *New Orleans v. Winter*, (1 *Wheaton*, 91,) in 1816, the Supreme Court held, that the Circuit Court had no jurisdiction of a suit between a citizen of a territory and a citizen of a State, because a territory was not a State. The above ruling in regard to a citizen of the District of Columbia was followed in *Vasse v. Mifflin*, (4 *Wash. C. C. R.*, 519,) in 1825. In *Picquet v. Swan*, (5 *Mason*, 35, 54,) in 1828, Judge Story says: "A citizen of one of our territories is a citizen of the United States, but he is not by law entitled to sue or be sued in the Circuit Courts of the United States." In *Prentiss v. Brennan*, (*ut supra*,) Mr. Justice Nelson says: "A person may be a citizen of the United States and not a citizen of any particular State. This is the condition of citizens residing in the District of Columbia, and in the territories of the United States, or who have taken up a residence abroad, and others that might be mentioned. A fixed and permanent residence or domicil in a State is essential to the character of citizenship that will bring the case within the jurisdiction of the Federal Courts." This view was again asserted by the Supreme Court in 1867, in *Barney v. Baltimore City*, (6 *Wallace*, 280, 287,) in reference to a citizen of the District of Columbia.

The defendant refers to § 1,891 of the Revised Statutes, as making the plaintiff a citizen of a State. That section reads thus: "The Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere within the United States." It is a compilation of the provisions found

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Cissel v. McDonald.

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in eight statutes, in regard to eight different territories, which statutes are referred to in the margin of the section. The provisions were substantially alike, and are found in the statutes organizing the several territories, from 1850 to 1868. One is a specimen of all. The latest, Wyoming, in 1868, reads thus: "The Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said territory of Wyoming, as elsewhere within the United States." It is sufficient to say, that these enactments have no reference to the District of Columbia, as originally enacted. They refer only to the specific territory named in each statute. The words "organized territories," in § 1,891, cannot be so construed as to include the District of Columbia. And, if they could, the section could not be properly so construed as to have the effect to convert a citizen of such District into a citizen of a State, within the meaning of the statutes in regard to the jurisdiction of the Circuit Courts over suits, either by original cognizance or by removal.

As it appears, within § 5 of the Act of 1875, that this suit does not involve a controversy within the jurisdiction of this Court, an order will be entered to that effect, and that this Court will proceed no further therein, and that this suit will be remanded to the Marine Court of the city of New York, and that the defendant pay to the plaintiff his costs in this Court, to be taxed.

*Henry Greenfield*, for the plaintiff.

*Solomon F. Higgins*, for the defendant.

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Anilin v. Cochrane.

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## BADISCHE ANILIN AND SODA FABRIK

vs.

## ALEXANDER COCHRANE AND OTHERS. IN EQUITY.

Reissued letters patent No. 4,821, Division B, granted April 4th, 1871, to Charles Graebe and Charles Liebermann, for artificial alizarine produced from anthracine, are valid.

The decision of this Court in *Anilin v. Higgin*, (15 Blatchf. C. C. R., 290) confirmed.

Artificial alizarine, made according to the process of the patent, was a new product, and was patentable.

The application for the patent was not accompanied by any specimen of ingredients or of the compound; but it was for the Patent Office to determine whether the nature of the case admitted of specimens, and the want of them is not made a statutory defence to a patent.

The artificial alizarine of the patent is different from chemically pure alizarine, and the patent covers the invention.

The patent is infringed by an article produced by the process of letters patent No. 158,586, granted July 28th, 1874, to Heinrich Caro, Charles Graebe and Charles Liebermann.

(Before WHEELER, J., Southern District of New York, April 15th, 1879.)

WHEELER J. This bill is brought upon Division B of reissued letters patent No. 4,321, dated April 4th, 1871, to Charles Graebe and Charles Liebermann, for artificial alizarine produced from anthracine, now owned by the plaintiff. The cause was heard upon the pleadings and the plaintiff's evidence, at October Term, 1877. While it was under consideration, a motion to open it for taking further evidence was filed by the defendants, and evidence was taken upon that motion. Pending the motion the parties, with the consent of the Court, stipulated all that evidence and some other into the case, to be used as if taken in chief, and it has again been fully heard upon the pleadings and all this evidence and arguments of counsel.

The original patent was for the process of making this

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Anilin v. Cochrane.

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alizarine. It was surrendered and reissued in two divisions, one for the process, and the other, this one, for the product. This division of the patent, and the question of infringement by the same means as those by which the defendants are now claimed to infringe, were under consideration in a cause in favor of this plaintiff, *v. Hamilton Manufacturing Company*, in the Massachusetts District, February 4th, 1878, (13 *Off. Gaz. of Pat. Off.*, 273,) and in another cause, against Higgin, in this District, September, 1878, (15 *Blatchf. C. C. R.*, 290.) Several questions were made there about the regularity of the reissue, which have not been insisted upon here. The questions now raised in argument are, whether this product is, in fact, so new a product as to be patentable under the law in any form? and, if it is, whether this division of the patent, as granted, covers it? and, if both, whether the defendants infringe it? These questions were considered and determined in those cases, as there presented. But there is considerable evidence in this case not in either of those; and, therefore, it has been fully heard, examined and considered, by itself, without resting its decision upon the authority of those.

Alizarine is a natural dye-stuff, found in the root of the madder plant, and has long been known as such, in the art of coloring. It is formed and held in the fibre of the root, and reached by disintegrating the substances which it is among, separating it from them, and securing it by long and well-known processes. It is essentially an extract from among other natural products, and not in any sense an artificial compound. Its structure was carefully studied by chemists, and its molecular formation ascertained to be composed of fourteen atoms of carbon, eight of hydrogen, and four of oxygen, represented by the formula  $C_{14} H_8 O_4$  of chemists. The defendants insist that the production of Graebe and Liebermann is the same thing.

Anthracine was a waste product of coal-tar—a hydro-carbon—its molecules consisting of fourteen atoms of carbon and ten of hydrogen, in formula  $C_{14} H_{10}$ . A chinone had

been formed from it, by replacing two atoms of hydrogen with two of oxygen, called anthrachinone, with the formula  $C_{14} H_8 O_2$ , having two atoms less of oxygen than chemically pure alizarine. Anthracine was not in any sense a dye-stuff, neither was anthrachinone; and neither did either contain anything that was a dye-stuff, or any coloring matter which could be extracted in any manner, for none was there. But their molecular structure was so like that of alizarine, that Graebe and Liebermann were led to investigate whether there was anything there from which any substance, embodying the coloring principle of alizarine, could be produced. To produce what would have the same chemical formula, it was necessary to add two atoms of oxygen, or to replace two atoms of hydrogen with two of hydroxyl. That accomplished would not insure the production of the same thing, although having the same formula, nor anything with like properties. The molecules to be acted upon were very complex, and their atoms very liable to be disarranged by any process of addition or substitution. Graebe and Liebermann devised a method, involving various steps, for effecting the changes desired, tried it, and succeeded in obtaining a substance whose formula would be the same, and whose properties the same or like those of alizarine, and which they termed alizarine. When they had done this they had not discovered natural alizarine anywhere, and extracted it, but they had made an alizarine synthetically, from substances never before containing it, nor anything like it. What they made was a worthy substitute for, whether more or less nearly or exactly like, the natural alizarine of madder.

If this substance should be found to be so like natural alizarine that no one could tell the difference between them, or know them apart except by their source, the question would be presented, whether, even then, it would not, of itself, be subject under the law to a patent granting to its inventors an exclusive right to it, and whether this patent is not valid for that purpose. The statute entitled an inventor of any new and useful *art, machine, manufacture or compo-*

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Anilin v. Cochrane.

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*sition of matter* to a patent for it on application, accompanied by a drawing, with references, "where the nature of the case admits of drawings, or with specimens of ingredients, and of the composition of matter, sufficient in quantity for the purpose of experiment, where the invention or discovery is of a composition of matter." (*Act of July 4th, 1836, sec. 6, 5 U. S. Stat. at Large, 119.*) The application for this patent was not accompanied by any specimen of ingredients or of the compound. It is urged, in argument, that this product is not a patentable composition of matter, and that the absence of specimens shows it is not, and that it is not a manufacture, nor anything mentioned in the patent law as patentable. These terms in the statute are not understood to be placed there as stools, betwixt which inventors may fall to the ground, but to cover the whole range of useful invention, to every piece of which some one of them, and to many, more than one of them, will apply. This product may fall under the head of either a manufacture, or a composition of matter. If it is a composition of matter only, the statute, from the context as quoted, may be construed to mean that specimens are to accompany the application, when the nature of the case admits of specimens. If the statute is so construed, whether the nature of a case so admits, must be left to the determination of the Patent Office, subject to its requirement. And in this case it must have been determined that the nature of the case did not so admit, and so none have been required. And, however this may be, the statute has not placed the lack of specimens among the defences to a patent, and, as it was granted, it cannot fail for that reason.

The English Statute, (21 *Jac.*, 1, c. 3,) only saved grants and privileges of the sole working or making of any manner of new manufacture within the realm, to the first and true inventors of such manufactures, from the prohibition of monopolies; but, under the liberal construction which the word manufacture in the statute, from the nature of the subject, required, and, at the hands of the Courts, received, to carry out the intention, it was extended so as to cover all sub-

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Anilin v. Cochrane.

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jects of invention of material things that were useful. (*Boulton v. Bull*, 2 *H. Black.*, 463; *Hornblower v. Boulton*, 8 *T. R.*, 95.)

This production of Graebe and Liebermann, however like natural alizarine, was not that. It was entirely new in its source and its coming. No one had ever seen or known of such a thing before. Its addition to the productions known before was, in the language of Buller, J., in *Rex v. Arkwright*, (*Web. Pat. Cas.*, 71,) a vast "improvement of the trade." According to Heath, J., in *Boulton v. Bull*, the product only, and not the process alone, would have been patentable, under the English statute. He said, referring to the statute: "What then falls within the scope of the proviso? Such manufactures as are reducible to two classes. The first includes machinery, the second substances, (such as medicines,) formed by chemical and other processes, where the vendible substance is the thing produced, and that which operates preserves no permanent form." "I asked, in the argument, for an instance of a patent for a method, and none such could be produced. I was then pressed with patents for chemical processes, many of which are for a method, but that is from an inaccuracy of expression, because the patent in truth is for a vendible substance." This, of course, does not show that, under a statute which includes the term art, a process merely would not be patentable; but, a product patentable under one would be under the other. In *Steiner v. Heald*, (6 *Eng. L. & Eq. R.*, 536,) the patent was for the invention of a new manufacture of garancine. Garancine was an extract from madder, having its pure red coloring matter, and was well known. The plaintiff produced it from spent madder, by the same process by which it had before been produced from fresh madder. It was ruled at the trial, that, because it was the same substance, it was not a new manufacture. This ruling was reversed in the Exchequer Chamber, on the ground that spent madder "might be a very different thing from fresh madder, in its properties, chemical and otherwise," and that whether it was or not would be material to the validity

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Anilin v. Cochrane.

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of the patent. If it was, the novelty of the manufacture would consist wholly in the material from which it was produced. There would be a combination of new materials, which would be a new combination; and so there would be here. In the case of *The Wood Paper Patent*, (23 Wall., 566,) the paper pulp sought to be covered by the patent was not made at all by the new process, but was merely extracted by it. It was cellulose before the treatment and after; an extract and not a compound; and its patentability appears to have been denied on that ground. There was no new combination about it.

The plaintiff does not, however, rest the claim of novelty upon the production from a new source, but claims, upon the evidence, that the thing itself, independent of its source, when compared with the alizarine of madder, is different from it. The defendants deny this, and the evidence, although all credible, in view of the honesty and sincerity of the witnesses, is somewhat conflicting. The question is one of fact, and quite intricate, involving a high degree of skill in the subject, and requiring the aid of persons possessed of it, which has been furnished by both sides.

Considerable of the testimony, and especially of that from abroad, taken probably without the presence of counsel who manage the cause, goes to show only what Graebe and Liebermann sought after, and thought they had found, when they had succeeded with their experiments, rather than to show what they actually did discover and invent. But, what they sought for, intended, or thought, does not seem to be of so much importance here. An invention is not like a will, depending on intention. It is a fact, and, if the fact exists, it does not appear to be material whether it came by design, or accidentally without being bidden. The question here is, whether this substance which they produced is, in its structure and properties, old or new; and not whether they looked for something old or new, or thought they had found either one or the other. Separated from the rest, the testimony as to whether this product is actually different from the other,

in some respects material to dye-stuffs, is full, and not very conflicting. Each has the formula  $C_{14} H_8 O_4$ , but that is not conclusive. Alone it is hardly a circumstance. Chemists on each side of the case agree about this. Prof. Chandler, at page 204, so expresses himself, and instances diamonds and plumbago as having the same formula without any resemblance. The testimony of President Morton at page 466, and that of Prof. Hedrick at page 52, is to the same effect. As an example akin to this question, shown by the evidence, there is the purpurine of madder, whose formula is  $C_{14} H_8 O_5$ . Perkin discovered a purpurine from anthracene, which he called anthrapurpurine; Auerbach, a purpurine from the same source, which he called isopurpurine. Some say these two are the same and others that they are different, but all agree that both are different from the purpurine of madder, yet each has the same formula  $C_{14} H_8 O_5$ .

The presence of these newly discovered purpurines in the artificial alizarine, where they are said to have and appear to have an important influence, is relied upon largely as showing that it is different from the natural alizarine. The testimony of several eminent and reliable chemists is to the effect that it is so present. The testimony of Prof. Chandler, who is also eminent and reliable, is largely depended upon to show to the contrary; yet after spending a great deal of time in investigating the subject, and after having testified in regard to it several times before, and as late as November, 1878, he testified further, speaking of the process of the patent: "I am to-day unable to say whether anthrapurpurine or isopurpurine is a necessary by-product of the bromine process of Graebe and Liebermann." He appears to depend largely upon what they intended and thought, in settling in his own mind what they did. The little importance of their intentions and suppositions becomes more apparent, when it is considered, in this connection, that isopurpurine and anthrapurpurine, whether the same or different, were not discovered at all until 1870, long after the invention and patent. On this question it seems sufficient to say, without specifically refer-

ring to the evidence further, that it is satisfactorily found, as a matter of fact, that this artificial alizarine of the patent is essentially different, in capabilities and properties, from chemically pure alizarine, madder alizarine, or any coloring matter before known and used.

It has been argued with much plausibility, for the defendants, that the patent itself is, in intention and effect, a patent for chemically pure alizarine; that the various steps of the process described in it might as well be represented by chemical notation, in equations and formulæ which would end in the formula  $C_{14} H_8 O_4$ ; and that, if the finding should be as just stated, the invention would be of one thing, and the patent for another, and that patented old and well known. Here, in view of the evidence relied upon in support of these propositions, the distinction between what the inventors actually did, and what they intended to do and supposed they had done, as well as the difference between this patent and others and other documents, must be attended to. In the specification of an English patent, and elsewhere in writings, they characterized this product as chemically pure alizarine. There is considerable controversy among experts about the meaning of that expression where used. But neither that expression, nor the formula for it, is used in this patent, and this patent must speak for itself, and be understood as expressing what is to be gathered from what is there. Considering anthracene, or anthrachinone, as the starting point, the patent describes a series of chemical reactions ending with the "yellow flocks of alizarine." These reactions might be stated in equations, but it is to be remembered that, as shown before, the successive formulæ, when stated, would not show all the characteristics or properties of the corresponding substances. So, the fact that they could be expressed in equations, and that chemists would understand the same things when so expressed that they do as now expressed, is not at all decisive. Neither could the actual effect of such reactions be accurately calculated beforehand. They must be first tried and their effect found from the actual result.

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Anilin v. Cochrane.

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The question here is what in fact this result, the alizarine in yellow flocks, is. There can be no fair doubt, upon the evidence, but that the process can be carried out to a practical result. Several persons testify that they have done it, and no one testifies that these persons have not done it, nor really that it cannot be done. Those who have done it to any considerable extent agree, also, in testifying, that a practical dye-stuff is produced, which, although represented in formula like chemically pure alizarine, and probably containing it, is different from it. Upon this testimony, considered with all the other testimony and evidence, it is found that the product of the patent is different from chemically pure alizarine, and that the patent covers the invention.

It remains to be considered whether the defendants infringe. That they deal in an article produced by the process of subsequent letters patent, No. 153,536, dated July 28th, 1874, to Heinrich Caro, Graebe and Liebermann, is proved and not disputed. If that substance is the same, they do infringe.

In the patent in controversy, anthracene was to be converted into anthrachinone by a known process mentioned; and anthrachinone into alizarine, according to Prof. Chandler, by adding, by means of bromine, two atoms of oxygen; or, according to President Morton, by substituting two atoms of hydroxyl for two atoms of hydrogen, by introducing in place of the hydrogen, bromine, which could be replaced by the hydroxyl; or, according to Prof. Ordway, by replacing the hydrogen with hydroxyl by the use of bromine as a radical. These are understood to be merely different descriptions of the same chemical process, in which the bromine, as said by Prof. Hedrick, does not inhere at all in the result. It served only as a sort of vehicle to carry in what was necessary, and fetch away what was not wanted, without disarranging the rest. It was discovered that sulphuric acid was superior to bromine for this purpose, performing the same offices in the same way. The Caro patent is for this improvement. Some say this was merely substituting one well-known equivalent

for another; others, that it involved inventive skill. Which are right is of no consequence here now. There is but little, if any, disagreement about the result being the same.

The defendants stoutly invoke Graebe and Liebermann themselves in support of some of their positions. Their statements upon this subject have been observed. They state that they tried sulphuric acid at first, but made the mistake of using too low heats. That "Caro first noticed that anthrachinone, if heated with sulphuric acid to above 200°, would give sulpho-acids, which, on fusing with hydrate of potash, formed alizarine, the same as the bromine compound."

- They describe the development of this process further, and then say, further: "The first process is, therefore, identical with the first bromine method given above." They then describe the second method, and add, in conclusion: "On fusing the two sulpho-acids, they give alizarine exactly like the monobrom-, and dibrom-, anthrachinone." The patent is to the same effect. The specification commences: "This invention relates to improvements on an invention described in letters patent of the United States, granted to Charles Liebermann and Charles Graebe, for improvements in preparing coloring matters, dated the 5th day of October, 1869, No. 95,465, in which the preparation of artificial alizarine is based upon the action of caustic alkalies upon bibrom-anthrakinon or bichlor-anthrakinon. We have now discovered that a similar result may be obtained by substituting sulphuric acid for bromine or chlorine, in the above process."

Both the intended and the actual identity between the products, as to both source and properties, seem to be clearly established. And the establishment of this is of some importance, bearing upon the question of fact, before considered, as to the likeness between the natural and artificial alizarine. Prof. Chandler, upon whose testimony the defendants appear to most strongly rely, claims that the differences between them have been found in the product of the latter patent and not in that of the former. This may well have been, because they have not been so much looked for in the former.

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Codman v. The Vermont and Canada Railroad Company.

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But, if the products of the two patented processes are identical, as is here found, what he recognizes as differences to some extent in the product of the latter patent would be found in that of the former, if persistently sought after.

These conclusions are the more satisfactory, because they are in accordance with those reached in the two former cases upon this same division of this patent, in the one of which, in this District, much reliance was placed upon the decision of that in the District of Massachusetts, and the opinion of Judge Shepley there.

Let there be a decree establishing the validity of this division of the patent, and for an injunction and an account, according to the prayer of the bill, with costs.

*George Gifford and John Van Santvoord*, for the plaintiff.

*Dickerson & Beaman*, for the defendants.

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ROBERT CODMAN AND HENRY A. JOHNSON

vs.

THE VERMONT AND CANADA RAILROAD COMPANY.

The trustees and managers of the Vermont Central Railroad Company and the Vermont and Canada Railroad Company issued notes, to the amount of \$1,000,000, in sums of \$1,000 each, by which they, as trustees and managers only, reciting that it was in accordance with the votes of the stockholders of the two companies, and by virtue of a decree of the Court of Chancery of the State of Vermont and of a special Act of the Legislature of Vermont, promised to pay to the order of the defendant the sum, 20 years from date, with interest at the rate of 8 *per cent. per annum* payable semi-annually, at their office in Boston, on presentation of the interest coupons attached. The notes were signed by the trustees and managers, as such, and interest coupons, payable to bearer, for each instalment of interest, were attached. On each

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 Codman v. The Vermont and Canada Railroad Company.
 

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note was this endorsement, signed by the treasurer of the defendant, under its seal: "For value received, the Vermont and Canada Railroad Company hereby guarantee the payment of the within note, principal and interest, according to its tenor, and order the contents thereof to be paid to the bearer." The notes were put on the market, and C. purchased 50 of them at par and  $\frac{1}{2}$ , without notice in regard to them, beyond the general knowledge, open to all, of the location and situation of the railroads, and what appeared upon, and would be suggested by, the face of the instrument. C. sued the defendant to recover the amount of 2 coupons on each of the 50 bonds. The defendant admitted the "demand, notices and protest of said coupons, as they fell due."

*Held:*

- (1.) The defendant became liable upon the notes, as guarantor, to any one to whom the guaranty would run and who would be entitled to sue upon it;
- (2.) Whether the guaranty was negotiable, *quere*;
- (3.) The endorsement was a contract of endorsement, running to the bearer;
- (4.) The admission as to demand, notices and protest, is sufficient to show that the liability of the defendant as endorser became fixed;
- (5.) Interest at the rate of 7 *per cent. per annum*, and no more, can be recovered on the notes, with interest at that rate, on such interest, as damages, from the time when payment should have been made.

(Before WHEELER, J., Vermont, April 15th, 1879.)

WHEELER, J. This is an action of assumpsit against the defendant, as guarantor and endorser of fifty negotiable bonds, of one thousand dollars each, to recover arrears of interest thereon, and has been tried by the Court upon stipulation of the parties waiving a jury, filed.

The defendant leased its road, before it was built, to the Vermont Central Railroad Company, reserving semi-annual rent equal to eight *per cent.* annual interest on its cost, and, to secure payment, took a stipulation for re-entry and a conveyance of the Vermont Central Railroad, to be operative on default, giving a right "to receive all tolls, fares and other lawful income receivable for the use of the said railroads," and, after paying expenses, to "apply the residue of its said receipts in and towards the payment of all rent then in arrear and unpaid." The Vermont Central Railroad Company also mortgaged its road by two successive mortgages, subject to the security for the Vermont and Canada rent. Default was made of the mortgage debts, and also of the rent, and the roads were surrendered to the mortgage trus-

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Codman v. The Vermont and Canada Railroad Company.

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tees. The Vermont and Canada Company brought a bill in equity, in the Court of Chancery of the State, to enforce its security for the payment of its rent, and the roads were by that Court placed in the hands of receivers. Much question was made, in that proceeding, as to the effect and validity of the lease and conveyance to secure rent, but they were finally held valid and operative, by the Supreme Court of the State, on appeal, and the amount of the annual rent was fixed, but it was not decided that the possession of the roads should go to the Vermont and Canada Company, and they were left in the hands of receivers, to be operated, and to have the income applied in satisfaction of the rent, and, after that, of the mortgage debt, subject to the control of the Court of Chancery. (*Vt. & Canada R. R. Co. v. Vt. Central R. R. Co.*, 34 *Vt.*, 1.) After that decree, an agreement was entered into between the Vermont and Canada Company and other security holders, sanctioned by a special Act of the Legislature of the State, by virtue of which a further decree was entered up in the cause, authorizing an increase of the stock of the Vermont and Canada Company to two millions of dollars, and providing for the payment of rent equal to eight *per cent.* annual interest on that amount, which was to "be paid by the trustees and receivers from time to time in possession of said roads and property, and from the income thereof," and, for the payment of the residue, after paying certain expenses, to the subsequent security holders, and for keeping the cause on foot, with liberty to any party to apply to the Court for further orders therein. The trustees and receivers in possession, from time to time, with consent of the Vermont and Canada Company, and some of the other security holders and representatives of others, obtained orders of the Court for, and negotiated, equivalent loans. In the fore part of 1871, they represented to the directors of the defendant, that they were under a large floating debt, incurred in building extensions of the Vermont and Canada Railroad, in improving the road-beds and superstructure of the Vermont Central and Vermont and Canada roads, and in procuring

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Codman v. The Vermont and Canada Railroad Company.

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additional equipment for them, and proposed measures for relief. They adopted a resolution providing for new stock to pay for and represent the cost of the extension, and for a new loan of a million of dollars, to be endorsed and guaranteed by that company, and for a meeting of the stockholders to consider the subject. Meetings of the directors and stockholders were held on the 16th day of May in that year, and it was voted at each, that the company should endorse and guarantee the notes of the trustees and managers, to the amount of one million of dollars, payable in twenty years from date, and bearing interest at the rate of eight *per cent.* per annum, payable semi-annually, and the treasurer was authorized to execute the endorsement and guarantee. Application to the Court was made immediately by the trustees and managers, for leave to the Vermont and Canada Company to issue new stock, and for them to issue their notes for the loan, which was granted, and that company was authorized to issue five hundred thousand dollars of new stock, on account of the construction of the branches, to meet a part of the floating debt, and the trustees were authorized to issue their notes, as stated, to the amount of a million of dollars, to be endorsed and guaranteed by the company, to meet the residue. The notes were issued in sums of one thousand dollars each, by which the trustees and managers, as trustees and managers only, reciting that it was in accordance with the votes of the stockholders of the Vermont Central and Vermont and Canada Railroad Companies, and by virtue of a decree of the Court of Chancery, as well as of a special Act of the Legislature of Vermont, promised to pay to the order of the Vermont and Canada Railroad Company, the sum, at the time specified, with interest at the rate specified, at their office in Boston, on presentation of the interest coupons attached, and signed by the trustees and managers, as such; and interest coupons, payable to bearer, for each instalment of interest, were attached. On each was endorsed, by the treasurer, under the seal of the defendant company: "For value received, the Vermont and Canada Railroad Company

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● Codman v. The Vermont and Canada Railroad Company.

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hereby guarantee the payment of the within note, principal and interest, according to its tenor, and order the contents thereof to be paid to the bearer." The notes so executed and endorsed were put upon the market, and the plaintiffs purchased fifty of them at par and one-eighth, without notice in regard to them beyond the general knowledge, open to all, of the location and situation of these railroads, and what appeared upon, and would be suggested by, the face of the instrument. The coupons were paid by the trustees and managers to January 1st, 1876. Those falling due July 1st, 1876, and January 1st, 1877, were not paid. The "demand, notices and protest of said coupons as they fell due" is admitted in writing by the defendant. This suit is brought to recover the amount due upon them.

The defendant insists, that the agreement of guarantee and the obligations of endorser were, under the circumstances, wholly outside the scope of the corporate powers of the defendant and not binding; that it was mere accommodation paper as to the defendant, and that the guarantee was, therefore, not binding; that the endorsement is not sufficient in form to bind the defendant as endorser; that its liability as endorser would not become fixed by the demand, notice and protest admitted of the coupons; that, if the endorsement was sufficient and the protest good, the guarantee, coupled with the endorsement, would show that both were for accommodation and prevent liability of the defendant.

The statute law of the State then was and now is: "Every railroad corporation within this State, if it shall vote so to do, at a meeting of the stockholders, called for such purpose, shall have power to issue their notes or bonds, for the purpose of building or furnishing their roads, or paying any debts contracted for building or furnishing the same, bearing such a rate of interest, not exceeding seven *per cent.*, and secured in such manner, as they may deem expedient." (*Gen. Stat. Vt.*, 237, *sect.* 97.) "All notes or bonds which may be issued under and by virtue of the provisions of this chapter shall be issued for a sum not less than one hundred dollars, and shall

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Codman v. The Vermont and Canada Railroad Company. 

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be made payable in not less than three years, nor more than twenty years, from the time of issuing the same." (*Id.*, sect. 99.) The form in which railroad companies should become parties to notes or bonds issued, whether as makers, guarantors or endorsers, would not seem to be important for bringing them within the provisions of these sections, if their object should be within the scope of the power conferred, and they should not be issued contrary to the provisions. The power extends to building and furnishing their roads and to paying debts for those things. In this case, no witness has testified directly to what the purpose was for which these notes were made and sold. All that appears on that subject is what appears from the corporate acts and conduct of the defendant in connection with, and upon the representations of, the trustees and managers. They were issued and sold to pay a floating debt. This debt was represented to be for construction of new road under the charter of the Vermont and Canada Railroad, and for improving the road-beds and superstructure and providing equipment for both roads. The defendant voted to issue its new stock to pay for the construction, and to endorse and guarantee the notes to pay the rest of the debt, upon these representations. The question of fact involved is to be found upon such evidence as is competent to bind the defendant. This corporate action is deemed sufficient to show, as against the defendant, that the debt was, and it is found to have been, a debt contracted for those purposes. This purpose was building and furnishing the roads, within the meaning of the statute. The power only extends, however, to building and furnishing *their* roads, and, if these were not the defendant's roads, this building and furnishing did not come within the statute. It is said, in argument, that the defendant has never actually had any railroad at all; for, it leased its road by perpetual lease, before it was built, reserving to itself rent, so that it had nothing left but a rent charge upon the roads of others. (*Litt.*, sect. 218; *Co. Litt.*, 144 a.) This is true, except as to the stipulation for re-entry into the road leased, and the conveyance taken of the other to

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*Codman v. The Vermont and Canada Railroad Company.*

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secure the rent, and true notwithstanding them, until there was a default entitling them to the roads, and until it availed itself of its right to the roads. When their proceeding in equity to enforce the security produced a receiver of the roads and put them into the possession of receivers, the receivers were mere officers of the Court, without any rights whatever of their own, and they held the property under the direction of the Court, by the title of and for whoever should ultimately be entitled to it. The Supreme Court of the State held that the defendant was entitled to it to hold until the profits should pay the rent, but, under the then existing circumstances, left the roads in the hands of the receivers, and accorded to the defendant its rights, by requiring the profits to be paid upon the rent. The roads were, then, the roads of the defendant, and would continue to be so until the rent should be paid. The agreements and transactions which resulted in the compromise decree did not vary the title and right of the defendant to the property. By the express terms of the decree, it was provided, clause fourth: "That rent shall be paid to said Vermont and Canada Railroad Company, upon said sums of two millions of dollars, chargeable upon the whole property and income of said roads, as a first lien thereon," &c. There was no conveyance by anybody to the trustees and receivers. They were there in possession, under the orders of the Court, without title of their own, and were merely left there without title of their own, and with no provision for them to acquire title. The ownership was that of the defendant, to the extent of its rent, then in the mortgagees of the first mortgage, to the extent of the mortgage debt, and then in the mortgagees of the second mortgage, to the extent of that debt, and then in the Vermont Central Railroad Company. The arrangement, so far as its terms were concerned, was perpetual. If successful enough, it might work out a right in the Central Company to the possession of the roads, subject to the lien of the defendant, by paying off the mortgage, after satisfying the accruing rent, but that would never increase the rights of the trustees and

receivers; they would all the while remain in possession for others. In this situation they were claimed to be, and for some purposes were held to be, receivers of the Court. (*Vt. & Canada R. R. Co. v. Vt. Central R. R. Co.*, 46 *Vt.*, 792.) When they asked for an order to sell the property as receivers, the Supreme Court of the State held that they were not receivers strictly, but rather managing agents. (*Id.*, 50 *Vt.*, 500.) It is no part of the present purpose here to do more than ascertain whether, under the laws of the State, and the procedure, as expounded by the Courts of the State, the roads were the roads of the defendant for furnishing and equipment. For this purpose it is not necessary that they should belong to the defendant absolutely, to every intent and for all other purposes, but is enough if they so belonged for the present purposes needing the furniture and equipment. If agents, there must be a principal, and, in the transactions creating the agency, there was no party more prominent in the character of principal than the defendant. If receivers, they wanted the money got for these notes for the improvement of the defendant's property in their hands as receivers, in the manner authorized by the statute; if agents, they wanted it for the same purposes for the property in their hands as agents. They executed the notes in the character only in which they held the property, and not as individuals. That would only bind the right by which they held the property, which was all subject to the defendant's right, except so far as, if at all, they represented the defendant. So that, until the defendant's right to the property should be satisfied, the defendant was the sole party, in reality, to the notes, and the sole party to be benefitted by the consideration of the notes. Without the furniture and equipment of the roads, the trustees could earn nothing for the defendant. Its interest was that of an owner, direct, and not remote. In this view the defendant became liable upon the notes, as guarantor, to any one to whom the guarantee would run, and who would be entitled to sue upon it.

This guarantee is not, in terms, negotiable. By it the de-

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Codman v. The Vermont and Canada Railroad Company.

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fendant guarantees the payment of the note, principal and interest, "according to its tenor." The note being negotiable, perhaps these words draw that quality into the guarantee. If they do, the guarantee would seem to be negotiable. (*Story on Prom. Notes*, § 484.) If not, in *Partridge v. Davis*, (20 *Vt.*, 499,) Davis, J., seems to have thought such a guarantee would, in effect, be negotiable, while in *Sandford v. Norton*, (14 *Vt.*, 228,) and *Sylvester v. Downer*, (20 *Vt.*, 355,) the late Chief Justice Redfield was clearly of the opinion that, like ordinary simple contracts, such guarantees would not be negotiable. No case has been noticed in which this precise question has been settled by the decision of the highest Court of the State of Vermont, where this contract was made. The plaintiffs are remote holders, and had no transaction directly with the defendant, and cannot recover upon the guarantee itself, unless it is negotiable. It is not, however, necessary to decide upon this here, unless the endorsement or protest is defective, for, the amount and effect of recovery would be the same upon the endorsement as upon the guarantee.

The endorsement was filled up by the endorser when it was made; therefore, it is not capable of being filled up by an implied authority to write what would be according to commercial usage and the presumed intention of the parties, or of being altered to that, as would have been the case if the endorsement had been in blank and been left so, or had been wrongly or defectively filled up by some one besides the defendant, afterward. It is what the defendant made it, and all that was made or authorized in that behalf, and must speak for itself. The notes were payable to the defendant or order; the defendant, by the endorsements, ordered the contents of the notes to be paid to the bearer. The language used is like that which would have been used by the defendant in drawing a bill of exchange in favor of the bearer, on the makers of these notes. In that case, the defendant would order them to pay the sum named in the bill to the bearer. In this case, the defendant orders them to pay the

sums named in the notes to the bearer. In each case, by assuming to order the money to be paid, the party undertakes that it shall be paid, if due diligence, according to the law-merchant, is used. This endorsement seems to be ample and appropriate for the purpose of laying a foundation for liability, and not to be unusual. (*Story on Prom. Notes*, § 138, *note*.) *Vincent v. Horlock*, (1 *Camp.*, 442,) and the language of Lord Ellenborough used therein, have been referred to by counsel for the defendant, as showing that such an endorsement would create no liability, although it would carry the title to the note. One Jacks drew the bill payable to his own order and endorsed it in blank and delivered it to the defendants. One of the defendants, a firm, wrote over the signature of Jacks: "Pay the contents to Vincent & Co.," without signing it at all. So, the defendants' names were not on the bill at all. The point was, whether writing those words over the name of Jacks made the defendants liable as endorsers. As to that, Lord Ellenborough did say: "We see these words, '*Pay the contents to such a one*,' written over a blank endorsement every day, without any thought of contracting an obligation; and no obligation is thereby contracted." That all would agree to.

The protest itself is not shown, but demand, notices and protest of the coupons, as they fell due, are admitted. The endorsements are upon the notes and not upon the coupons. The only question about this is, whether the case shows that the instruments endorsed are the ones protested. If not, the liability as endorser may not be fixed, for want of that connection. The notes ran, that interest should be paid on presentation of the coupons. The plaintiffs held both notes and coupons. The coupons themselves contain promises to pay, but there is no reference to the defendant in them. The notice admitted, which must have been notice to the defendant, could not have been given without production of the notes as well as of the coupons. So, the admission, in connection with the circumstances, is taken to mean, that the notes and coupons were presented together, and payment thereupon

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Codman v. The Vermont and Canada Railroad Company.

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was refused, and that protest was made for that non-payment, whereby the liability of the defendant as endorser became well fixed.

These notes were issued in sums of not less than one hundred dollars each, and made payable in not less than three nor more than twenty years from the date of issue, and are in accordance with the provisions of the statute in all respects, except that their rate of interest is eight *per cent.*, while the statute recited provides for a rate not exceeding seven. In Vermont, where this contract was made, stipulating for or taking interest at a rate greater than the law allows does not vitiate the obligation. If such interest is not paid, it may be recovered for at the legal rate; if it is paid, the excess may be recovered back. In Massachusetts, where the notes were payable, no rate of interest was unlawful. If the law of Massachusetts is to govern, this feature of the notes cannot affect the right of recovery at all; if that of Vermont, it can only affect the rate of recovery and the amount.

In ordinary cases, where there is no limitation upon the power to enter into such a contract, nor anything otherwise to affect its inherent validity, interest may be stipulated for, and is to be paid according to the law of the place of payment or performance. (2 *Kent's Comm.*, 460, note c; *Story on Prom. Notes*, § 155; *Andrews v. Pond*, 13 *Pet.*, 65.) But, where the power to enter into such a contract, or the validity of it when entered into, depends upon the law of the place where made, or the contract is made apparently with special reference to the law of that place where made, that law governs. (*De Wolf v. Johnson*, 10 *Wheat.*, 367; *Andrews v. Pond*, 13 *Pet.*, 65.) In *Cheever v. Rutland and Burlington R. R. Co.*, not reported, the notes were executed in Boston and payable there, but were made by a railroad corporation of Vermont, and were to bear interest at seven *per cent.*, and, on their face, referred to the statute before recited, as authority for issuing them at that rate. The legal rate in Massachusetts was, at that time, six *per cent.*, and the defendants contended that the law there should govern, and that

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Codman v. The Vermont and Canada Railroad Company.

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only six *per cent.* could be recovered. The Supreme Court of Vermont held that the law and rate of Vermont must govern. Steele, J., in the opinion, (*Pamphlet*, p. 16,) said: "The situation of the parties and of the subject-matter of the contract may conclusively show that the parties contracted, in good faith, with reference to the law of the State where the security was located, and fixed upon some commercial centre as the place of payment, merely for the convenience of the holders of the loan, who, in such cases, are often widely scattered and continually changing." In *Andrews v. Pond*, 13 *Pet.*, 65, 78,) Chief Justice Taney said: "The question is not which law is to govern in executing the contract, but which is to decide the fate of a security taken upon an usurious agreement, which neither will execute. Unquestionably it must be the law of the State where the agreement was made and the instrument taken to secure its performance."

These notes, on their face, are executed by trustees and managers, as such only, and refer to votes of stockholders of the Vermont Central Railroad Company, and of the Vermont and Canada Railroad Company, Vermont railroad corporations, to a decree of the Court of Chancery, and to a special Act of the Legislature of Vermont, as authority for their issue. The endorsement of the defendant was made expressly by virtue of a vote of the stockholders, at a meeting duly called. The whole life of the contracts, as well of that shown by the endorsement, as of that shown by the note itself, not only in fact depended upon the law of Vermont, but was upon the face of each instrument shown to so depend. The law which gave the authority limited the rate of interest to be paid. The law was as if a part of the contract, and the limitation was inseparable from it, and would follow it everywhere. The contract of endorsement is separate from that in the notes, and may be so as to interest, as well as in respect to any other feature. (*Slacum v. Pomery*, 6 *Cranch*, 221; 2 *Kent's Comm.*, 460.)

This action is upon the notes themselves, for a breach of the contract expressed there, to pay the interest on the notes,

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Codman v. The Vermont and Canada Railroad Company.

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on presentation of the coupons. It is not exclusively upon the coupons, although they each contain an express contract, and would furnish ground for an action. So, the action is wholly for interest, as such, and the plaintiffs are entitled to recover for the interest at the rate allowed by law, and not more. The right to recover stands upon the same ground precisely as the right to recover interest, when due, upon ordinary contracts to pay interest annually or semi-annually, except that here the law allows seven *per cent.*, while in ordinary contracts it allows only six.

There are two instalments of interest on fifty notes of one thousand dollars each, one of which was due July 1st, 1876, the other January 1st, 1877. On each the defendant became liable to pay seventeen hundred and fifty dollars at those respective times. Payment was not made. There was no agreement to pay interest on those sums if payment should not be made. The statute quoted did not fix a rate in the absence of a contract, but merely permitted a valid contract to be made up to that rate. As the defendant did not pay, it became liable for interest as damages, as in cases of the breach of ordinary money obligations, from the time when payment should have been made. The same question arose in *Cheever v. Rutland and Burlington R. R. Co.*, before mentioned, upon this same statute, and was so decided there. (*Pamphlet*, p. 19.)

These conclusions make it unnecessary to decide the questions so fully and ably discussed by counsel, as to whether the defendant could be held, under the circumstances, if the undertaking had been without the scope of the corporate powers of the defendant.

As great pains as have been practicable, and more space than usual, have been taken with this cause, as well on account of the large interests otherwise involved in these questions, as of the just rights of the parties to this suit.

There must be a judgment for the plaintiffs, for the two

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Travers v. Dyer.

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instalments of seventeen hundred and fifty dollars each, with simple interest thereon, in all, \$4,033 75.

*The plaintiffs, pro se, and William G. Shaw and Benjamin F. Fifield with them.*

*Francis A. Brooks and Edward J. Phelps, for the defendants.*

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WILLIAM R. TRAVERS vs. JOHN M. DYER.

On a general demurrer to a count in an action of account, the question is, whether the count is sufficient in substance, without regard to form, but, sufficient must be alleged in some form to constitute a cause of action.

In the action of account there are two judgments—one, that the defendant account with the plaintiff; the other, after the accounting, for the balance found due.

The declaration must show the privity by which the plaintiff is entitled to an account, and, also, proceedings under or pursuant to it, raising a balance in his favor, to be recovered.

Counts held bad, for want of such averments.

(Before WHEELER, J., Vermont, April 15th, 1879.)

WHEELER, J. This is an action of account, in six counts. The first count is against the defendant as bailiff to the plaintiff of six thousand cords of wood; the second, as receiver of moneys of the plaintiff, to merchandise with, for their common profit; the third, as receiver of the moneys of the plaintiff as partner in hotel keeping; the fourth, as bailiff of the plaintiff's moiety of land held by them as tenants in common; the fifth, as bailiff of a moiety of other premises; the sixth, as bailiff of a moiety of other premises. The defendant has demurred generally to each of all the counts but the fourth, and tendered several issues upon that to the country. The cause has now been heard upon the demurrer. As

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Travers v. Dyer.

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the demurrer is general only, the questions are, whether the several counts demurred to are sufficient in substance, without regard to form ; still, sufficient must be alleged, in some form, to constitute a cause of action. A general demurrer supplies nothing toward that.

The action of account is somewhat peculiar in its proceedings, but the peculiarities will supply no lack of statement of a cause of action, as those in the action of book account, in the States of Vermont and Connecticut, do; to some extent. The action is for an account by the defendant to the plaintiff for money of the plaintiff received by the defendant by some privity of authority or appointment, or of estate, or of law ; and for the recovery of the balance due. There are two judgments in the action—one, that the defendant do account with the plaintiff ; the other, after the accounting, for the balance found due. The plaintiff, in his declaration, must set forth enough to entitle him to both judgments. The privity, by which he is entitled to an account, and proceedings under or pursuant to it, raising a balance in his favor to be recovered, must both appear. If a plaintiff has not these he is not entitled to maintain the action. If he has them but does not set them forth, he does not show himself entitled to maintain it. These are simple and just rules, by which these counts must be tested.

The first count sets forth the relation between the parties clearly enough, by alleging that the defendant, from one day to another named, was bailiff to the plaintiff, and during that time had the care and administration of the wood to be sold and made profit of, for the plaintiff ; but that is as far as it goes, except that it states that the defendant has not rendered any account, though requested. There is no allegation that any wood has been sold or profit made, nor anything to show there has been anything of the plaintiff's in the hands of the defendant, but the wood, and that may all be there yet, ready for the plaintiff. This count seems to be clearly bad.

The second count sets forth, that the defendant was the receiver of moneys of the plaintiff from a day to a day named,

however and by whatever contract accruing for the common use, benefit and profit of both, and during that time received ten thousand dollars, to merchandise with and make profits for both, to render a reasonable account thereof, but states no relation or privity under which the plaintiff so became the receiver, nor that he did merchandise with the money received, or did make any profit. In *Co. Litt.*, 172, it is said, that, "if two joynt merchants occupy their stocke, goods and merchandizes in common, to their common profit, one of them naming himselfe a merchant shall have an account against the other naming him a merchant," &c.; but here that is not done, nor is it alleged that they were in fact joint merchants or partners. This is quite important and material. The defendant has a right to traverse the relation alleged, and the extent of the right of the plaintiff claimed, and to have the issues tried and settled before judgment to account, and those matters should be alleged in, at least, traversable form, that the defendant may avail himself of the right, which is not here done. (*Wood v. Merrow*, 25 *Vt.*, 340.) This count is defective in substance.

The third count, after alleging the partnership of the plaintiff and defendant, charges that *they* received ten thousand dollars over and above the defendant's just share, but not that the defendant himself had received any more than his share. This may be a mere slip of the pen, in alleging that *they* received, intending to allege that he received; but, if so, there is nothing to correct it by. As the count stands, there is a plain lack of any allegation that the defendant is in arrear. This count is not good.

The fifth count alleges, that the defendant was bailiff to the plaintiff of an "undivided moiety or share," of certain lands. It is of importance that the right of the plaintiff should be definitely ascertained by the admissions of the pleadings or by trial. It must be definitely alleged before it can be definitely tried. If this allegation had stopped with "moiety" it would have been clear and exact. But the pleader added "or share," so the allegation stands that the defendant

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Travers v. Dyer.

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was bailiff of an undivided moiety or an undivided share, without stating of which; and, if of the latter, the share may be a moiety, or one of any number of parts into which an estate can be divided. This becomes too indefinite. The words, *or share*, cannot be rejected as surplusage, for they may be the ones on which reliance is placed, and as definite an allegation as could be made. This count is also bad.

In the sixth count, it is set up that the plaintiff was seized in fee of an undivided moiety of the premises, with the defendant, which the defendant held, as tenants in common. Perhaps the pleader intended to allege that the plaintiff and defendant were tenants in common, each owning a moiety, but if so he has not done so. As the count stands, they are alleged to be tenants in common of a moiety, which does not at all show what the share of either is. And it does not show who owns the other moiety, whether it is either of them or some other person or persons. If some other person, the action could not be maintained at common law, for it only lies between two and not more. Perhaps, however, the statute of the State would remove that difficulty. (*Gen. Stat. Vt.*, 344, *sec.* 17.) But, however that may be, the defect of not stating the shares of these parties remains, and is not of form merely. This count is, likewise, not good.

The action of account proceeds upon the ground that the defendant rightfully had the money for some purpose. The defendant cannot, therefore, be in default until he has refused or neglected to account and deliver, after being called upon by demand or an equivalent. In each of these counts the allegation in that direction is very faint. It is merely, that, although requested, and particularly on a certain day, he refused to account. This may be sufficient, although it hardly seems to be. The counts are judged of upon the other grounds mentioned and not upon this.

The demurrer is sustained, and the first, second, third, fifth and sixth counts are adjudged insufficient.

*Edward J. Phelps* and *Noble & Smith*, for the plaintiff.

*E. R. Hard* and *Stewart & Eldridge*, for the defendant.

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Brooks v. The Phoenix Mutual Life Insurance Company.

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SAMUEL T. BROOKS AND LUCY C. M. BROOKS, HIS WIFE

v8.

THE PHOENIX MUTUAL LIFE INSURANCE COMPANY.

A mutual life insurance company insured, by an endowment policy, the life of a husband for the sole benefit of his wife, in an amount payable to her on a day named. For four years the company accepted the notes of the husband as payment of one-half of the annual premium. The notes were given on the representation by the company that they would be paid by dividends. The notes pledged the policy and all payments which might become due thereon, to the company, for the payment of the notes. In a suit by the husband and wife, in the right of the wife, against the company, to recover the amount insured, the plaintiffs claimed that the dividends declared, if credited on the notes, would pay them in full. The defendant claimed that the amount due on the policy was the sum insured, less the amount due on the notes: *Held*, that the company was liable for the amount insured without any deduction for the unpaid notes.

The suit having been removed into this Court, under the Act of March 3d, 1875, (18 U. S. Stat. at Large, 470,) it was held, under § 6 of that Act, and § 968 of the Revised Statutes of the United States, that the plaintiffs were not entitled to costs, because their recovery was less than \$500, exclusive of costs, but that they ought not to pay costs.

(Before WHEELER, J., Vermont, April 15th, 1879.)

WHEELER, J. This is an action of assumpsit, upon an endowment policy of assurance upon the life of Samuel T. Brooks, and has been tried by the Court upon written waiver of a jury. The rights of the parties are to be determined upon the legal effect of the contracts in respect to this assurance, entered into by them. The principal contract was procured by Samuel T. Brooks, for the benefit of the other plaintiff, his wife. He was shown a circular of the defendant company, in which it was set forth, that one-half of the first four premiums would be payable in notes, after which dividends would be applied directly to the payment of premiums, and that: "In the settlement of all mutual policies a div-

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**Brooks v. The Phoenix Mutual Life Insurance Company.**

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idend will be allowed for each year on which the assured has received no dividend." The annual premium was fixed at two hundred and twenty-one dollars. He paid one hundred and ten dollars and fifty cents in cash, and executed his note for the same amount, payable in one year, with interest annually, at six per cent., in advance, which specified what it was for, and provided that the, "policy, and all payments and profits which may become due thereon, are hereby pledged and hypothecated to said company for the payment of this note," and delivered it to the company. The policy was thereupon issued, dated April 6th, 1866. The operative part of it, material to the present inquiry, ran thus: "This policy of assurance witnesseth, that the Phoenix Mutual Life Insurance Company, in consideration of the representations made to them in the application for this policy, and of the sum of two hundred and twenty-one dollars to them in hand paid by Lucy C. M. Brooks, and of the annual premium of two hundred and twenty-one dollars to be paid on or before the sixth day of April, in every year during the continuance of this policy, do assure the life of Samuel T. Brooks, of St. Johnsbury, in the county of Caledonia, State of Vermont, for the sole and separate use and benefit of the said Lucy C. M. Brooks, in the amount of two thousand dollars, payable to the said Lucy C. M. Brooks, or her executors, administrators, or assigns, on the 6th day of April, 1878," and, in case the said assured shall not pay the said annual premiums on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or any part thereof; and this policy shall cease and determine." Before making the second annual payment, a doubt arose in the mind of Mr. Brooks, as to whether these notes would be deductible from the policy in case he should live till it should become due, and he wrote to the general agent of the company, inquiring how that would be, and received an answer stating, that, "in the settlement of all mutual policies, we allow dividends and they cancel the notes." Relying upon this

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Brooks v. The Phoenix Mutual Life Insurance Company.

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statement, as well as upon what he had before read in the circular, he proceeded to make payments upon the policy in the remaining three of the first four years, giving notes, like the first, for one-half of the premiums, and paying the other half, with interest on the notes, in money. The dividends declared by the company in those four years were fifty *per cent.* of the amount of the premiums, and just equal to the amount of the notes. He received none of those dividends. After those years the premiums were settled in such manner that there is now no question about them. At the settlement of the last, a receipt was given, dated April 6th, 1877, in which it was stated, that, "said contract, with all its conditions, is hereby continued in force until the 6th day of April, 1878, and no longer. But, in case any note or notes given as part of cash premiums on said policy shall not be paid on or before maturity thereof, said policy shall at once become void, without further notice." In the year 1878 the company declared a dividend of twenty *per cent.* on the amount of premiums paid on policies of this class; they estimated that the three succeeding dividends would be of the same amount, and computed the amount due on the policy, by deducting the amount of the four notes, after applying four dividends of that amount upon them, and offered the amounts to the plaintiffs, which they refused, claiming the full two thousand dollars, and brought this suit to recover that amount, in the State Court. After removal of the cause from that Court, the plaintiffs received the amount which the defendants admitted to be due, with interest and costs to that time. The plaintiffs sue in the right of the wife, and claim that the notes given under the representations made in respect to their being given, should be considered as satisfied by the dividends declared in the years in which they were given, or by other dividends sufficient to cancel them, and that they are not collectible of any one; and that, if they are not so satisfied, and are still collectible of Mr. Brooks, they cannot reduce the amount which the wife is entitled to by the terms of the policy itself. The defendant claims that the

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Brooks v. The Phoenix Mutual Life Insurance Company.

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premiums have not been paid but by the notes, and that they are made a charge upon the policy and the amount due thereon, by their express terms, by which the wife is bound.

The policy sets forth the undertaking of the company only. That was to pay the sum of two thousand dollars at the time specified, if the premiums should be paid. The right to dividends grew out of becoming a member of the company, and was not set forth in any written contract. There was no agreement to pay the premiums. The policy could not be continued in force, except for its value under the law, as being non-forfeitable, without paying them, but, whether they should be paid and it should be continued in full force, or payment should be omitted and it left to fall back to its existing value, was optional with Mr. and Mrs. Brooks, wholly. The statements in the prospectus and letter of the agent were representations as to how the condition for keeping the policy on foot could be performed. They did not affect, nor profess to affect, the agreement of the company to pay if the condition should be performed. They bound the company to accept certain things as performance. The condition was performed as was represented would be accepted, what was done was accepted, and the acceptance was evidenced by the receipt of April 6th, 1877, by the terms of which the policy was continued in force until April 6th, 1878, when it fully matured, and the sum specified became due to the wife. There is nothing in the case which can, by any construction, or is claimed to, diminish the right of the wife to the two thousand dollars promised to be paid, except the giving the four notes by the husband, and his agreement contained in them, that the policy and all payments or profits which might become due thereon were thereby pledged and hypothecated to the company for the payment of the notes. By the charter of the defendant, which is a law of the State of Connecticut under which the defendant exists, (*sec. 6,*) it was provided, that such a policy as this, for the benefit of a married woman, should enure to her separate use and benefit, independently of her husband. And, by the law of the State of

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Brooks v. The Phoenix Mutual Life Insurance Company.

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Vermont, where both the husband and wife reside, and where the contract was entered into by the agent of the defendant, and has its *situs*, the same provisions are made with respect to like policies. (*Gen. Stat. Vt.*, 472, *sec.* 23.) By either law, therefore, as well as by the terms of the policy itself, the sum due on the policy belongs to the wife and not to the husband, and she could not be divested of her right to it except by some act that would bind her. She has never done anything herself that would qualify her right to it. It is not shown, unless it arises from the circumstances, that her husband was ever authorized to create any charge upon it for her. If any implication of agency would arise, he did not act nor assume to act under it. He executed the notes in his own name, without professing to act for any one else. Whatever right he had to the policy would be affected by his act, but he does not appear to have had any. He bound himself by his promise to pay contained in the notes, but not the property of his wife in the policy. So, without looking into the obligation on his part now to pay the notes, she is entitled to recover.

But, if the right to recover the balance due on the policy depended upon the obligation to pay the notes, the result might not be any different. They were executed and delivered to stand against dividends, in making up the several annual premiums. This was mutually understood between him and the company. They were all executed in view of the statement on the prospectus before quoted, that a dividend would be allowed for each year on which the insured had received no dividend. The insured received no dividend for the years on which the notes were given. On each of those years a dividend of fifty per cent. was declared. The dividends declared are the ones he is entitled to. The company is bound to allow those dividends against the notes, to make good that representation. If it should do less it would not keep its faith. These dividends exactly equal the notes in amount, and exactly pay them. The last three of the notes were executed and delivered in reliance upon the letter of the

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Brooks v. The Phoenix Mutual Life Insurance Company.

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agent, stating, that, in the settlement of all mutual policies, they allowed dividends and they cancelled the notes. That letter was written while dividends of fifty *per cent.* each on the premiums paid were being declared, and such dividends must have been those which he referred to.

It is argued, with plausibility, that as many dividends have been allowed as premiums have been paid, and as many as there were years in which premiums were paid, and which were as large as the profits would allow, and that thereby the representations were made good, although the dividends were not so large as the parties all expected. And it is, doubtless, true, that, by becoming a member of such a mutual company a party would only be entitled to such dividends as the profits would warrant, although much less than expected and than it was held out they would be, if the right ones should be allowed. But here the company has allowed to this policy four dividends, each equal to that of the last year, and much smaller than the others. And there was nothing in the transaction to indicate that no dividends were to be allowed for four years, and then four were to be allowed for one year. If the dividends had been all alike, as they had generally been before, there would be no difference in proceeding in that mode, but, when there came to be a difference, the party had the right to have the proper ones reckoned.

The plaintiffs have relied upon other representations in the prospectus, to the effect, that such insurance would be a good investment, as such, of the money paid, sure to return the full amount with a good rate of interest. But such statements were merely commendatory expressions of opinion, to be relied upon at peril.

There is some doubt whether this cause was removable into this Court at all. The test is the matter in dispute, which, in this class of cases, must exceed five hundred dollars. In this case, especially after the tender was made and received, it was considerably less than that. The tender was made before the removal, but is said, and, for aught that appears, correctly, not to have been received until after, and

then, it appears, under a stipulation that the removability of the case should not be affected by it. Probably, the stipulation would not help the jurisdiction; but, there has been no motion made to remand the case, and, as the want of jurisdiction is not clear, the cause is retained, although, when it appears, of course distinctly, it seems to be made, by the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) to determine the jurisdiction of the Circuit Courts of the United States, &c., the duty of the Court to remand the case, of its own motion. But, in section 968 of the Revised Statutes of the United States, it is provided, that, in cases originally brought in a Circuit Court, in which the jurisdiction depends upon the amount in dispute, if the plaintiff recovers less than five hundred dollars, exclusive of costs, he shall not be allowed, but, at the discretion of the Court, may be adjudged to pay, costs. In the Act mentioned, it is provided, (*sec. 6*,) that, in all suits removed under its provisions, the Circuit Court shall proceed the same as if they had been originally commenced there, and the same proceedings had been had there, as had been had in the State Court. This appears to include proceedings in respect to costs as well as the other proceedings in a cause. This cause was removed under that Act, and comes within the provisions of it, and those of the section of the Revised Statutes cited. Under both, the plaintiffs are not entitled to recover costs, but no reason is seen for adjudging them to pay costs. The costs in the State Court were paid as a part of the sum tendered, expressly for that purpose, and the part so tendered must rest as so applied, and cannot be taken out of the amount of the demand. The object of the statutes is to restrain bringing suits into the Federal Courts where the amount *in dispute*, not the amount *claimed*, is less than five hundred dollars. In this case, the amount really in dispute was always clearly less than that sum.

There must be a judgment for the plaintiffs, for the balance due, \$294 58, without costs.

*Henry C. Ide*, for the plaintiffs.

*Walter P. Smith* and *Luke P. Poland*, for the defendant.

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The United States v. The Buffalo Park.

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## • THE UNITED STATES vs. THE BUFFALO PARK.

A corporation which maintains a driving track, with stands and other conveniences for horse-racing, and annually, for several days in succession, devotes such track to horse-racing, and keeps its grounds open, for pay, to the public, and realizes money therefrom, is not liable to a tax on its gross receipts, under § 108 of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 276,) as conducting a public exhibition of feats of horsemanship, or a show which is opened to the public for pay.

(Before WALLACE, J., Northern District of New York, April 16th, 1879.)

WALLACE, J. This is an action to recover the amount of a tax claimed to be due under section 108 of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 276,) which provides, that "any person, firm or corporation, \* \* \* conducting or having the management of any theatre, opera, circus, museum, or other public exhibition of dramatic or operatic representations, plays, performances, musical entertainments, feats of horsemanship, acrobatic sports or other shows which are opened to the public for pay, but not including occasional concerts, school exhibitions, lectures or exhibitions of works of art, shall be subject to and pay a duty of two *per centum* on the gross amount of all receipts derived by such person, firm, company or corporation from such representations, plays, performances, exhibitions, shows or musical entertainments."

The defendant is a corporation existing under a special Act of the Legislature of the State of New York, which permits it to acquire land for a public park, and to construct riding and driving tracks and fair or show grounds; and it is authorized to give premiums to encourage competition and improvement in the mechanical arts, in the breed, usefulness, pace and value of horses, cattle and other domestic animals, and in agriculture and horticulture. It is authorized to charge for admission to its grounds. Pursuant to the object

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The United States v. The Buffalo Park.

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of its incorporation the defendant did construct a driving track, with stands and other conveniences for horse-racing, and annually, during the period for which the tax is claimed, for several days in succession, devoted its driving track to horse-racing, and kept its grounds open, for pay, to the public, realizing therefrom the sum of \$58,284. The question in the case, and the only question, is, whether such an exhibition is within the statute which imposes the tax. It is an exhibition of feats of horses and not of their riders, and, therefore, not within the statute, as an exhibition of "feats of horsemanship." If such an exhibition is included, it is because it is one of the "other shows which are opened to the public for pay," within the meaning of the statute. If it had been intended to tax the receipts of all public exhibitions, that purpose could have been tersely and completely expressed, without enumerating specifically various kinds of public exhibitions. The enumeration of the specified exhibitions indicates that these were the special subjects of legislative consideration. Some effect, however, must be given to the general descriptive term, "other shows;" otherwise, it would not have been employed. This is done by construing the general term to cover all other exhibitions of a similar kind to those which were present to the legislative contemplation, but not to include such as are not reasonably suggested by those specifically described. In the construction of statutes and of contracts, where general words of description follow particular ones, the general words are controlled and limited by the particular ones, so as to apply to subjects *ejusdem generis*. Thus, in the case of *Sandiman v. Breach*, (7 B. & C., 96,) the statute enacted, that no "tradesman, artificer, workman, laborer, or other person," should do or exercise any worldly business or work of their ordinary callings upon the Lord's day, and it was held that stage drivers were not included in the terms "other persons."

The statute in question forms part of a comprehensive scheme of taxation, one feature of which is the taxation of the profits or income of business avocations. Among well

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The United States v. The Buffalo Park.

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recognized business avocations is the management of many kinds of public exhibitions. Other public exhibitions, although conducted for profit in exceptional instances, are not primarily conducted for this end. It is evident that this distinction was present in the minds of the Legislature. Operas, museums, circuses and theatres are particularly mentioned in the statute, and they are all of the class of exhibitions ordinarily presented for profit and managed as business ventures. Closely approximating to theatres and operas are "exhibitions of dramatic or operatic representations, plays, performances, musical entertainments," and to circuses are "feats of horsemanship or acrobatic sports," but with differences which suggest the necessity of a particular enumeration. Then, for greater precision, the statute excepts certain entertainments or exhibitions which might otherwise be deemed included in the class described, but which are usually presented not primarily for profit, but for the education and improvement of the public. Thus it seems that the line is quite clearly defined, between exhibitions which are intended by their projectors for profit, and usually managed as business enterprises, and those which are not followed as business avocations. Fairs, industrial exhibitions and entertainments for charitable purposes, are all of them "shows which are opened to the public for pay," but they are not named and are not within the description of the exhibitions taxed. They are as much so, however, as are horse-races, base-ball matches, regattas, or various other "shows," which might have been subjected to tax. The defendant is not liable to a tax.

Judgment is ordered for the defendant.

*Richard Crowley, (District Attorney,) for the plaintiffs.*

*Bass, Cleveland & Bissell, for the defendant.*

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Phelps v. The Town of Yates.

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## WILLIS PHELPS vs. THE TOWN OF YATES.

By the Acts of the Legislature of New York, of May 11th, 1868, and April 19th, 1869, (*Laws of New York, of 1868, chap. 811, p. 1,823, and of 1869, chap. 241, p. 447,*) commissioners appointed for a town were authorized to borrow money on the faith and credit of the town, "and to execute bonds therefor, under their hands and seals," in aid of a railroad. The commissioners executed bonds and delivered them to the officers of the railroad company. The bonds, when so delivered, contained a recital, over the signatures of the commissioners, that they were issued under the hands and seals of the commissioners. In a suit against the town, on coupons belonging to the bonds, by a person who purchased such coupons for value and *bona fide*: *Held*, that the town could not be allowed to show that the bonds were so delivered before any seals were affixed, and with the dates and numbers of the bonds in blank, upon the understanding that the bonds were not to be negotiated until certain conditions on the part of the company were fulfilled, but that, before such conditions were fulfilled, the officers of the company affixed seals to, and inserted the dates and numbers in, the bonds and negotiated them.

(Before WALLACE, J., Northern District of New York, April 16th, 1879.)

WALLACE, J. The motion for a new trial, on the ground of newly-discovered evidence, must be denied, because, assuming that the defendant would be able to prove, upon another trial, the newly-discovered facts, these facts would not constitute a defence, nor would they be admissible in evidence. The plaintiff was shown, upon the former trial, to be a purchaser of the coupons upon which the action was brought, for value and *bona fide*, and no evidence to impeach his title as such purchaser, sufficient to go to the jury, was offered, and none is proffered now. The simple question is, whether, as against such a purchaser of the coupons, the defendant can be permitted to show that the bonds to which the coupons were originally annexed, were delivered, by the agents of the defendant, to the officers of the railroad company, before any seals were affixed, and with the dates and numbers of the bonds in blank, upon the understanding that the bonds were not to be negotiated until certain conditions on the part of

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Phelps v. The Town of Yates.

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the railroad company were fulfilled; but that, before these conditions were fulfilled, the officers of the railroad company affixed seals to, and inserted the dates and numbers in, the bonds, and negotiated the bonds.

The bonds were issued by commissioners for the defendant, appointed under chapter 811 of the Laws of this State, of 1868, passed May 11th, 1868, (*p.* 1,823,) and chapter 241, of 1869, passed April 19th, 1869, (*p.* 447,) by which the commissioners were authorized to borrow money on the faith and credit of the town, "and to execute bonds therefor, under their hands and seals." The bonds, when delivered to the officers of the railroad company, contained a recital, over the signatures of the commissioners, that they were issued under the hands and seals of the commissioners.

It has been decided, (*Avery v. Springport*, 14 *Blatchf. C. C. R.*, 272,) that bonds issued under a similar statute, without being sealed, were not in conformity with the statute, and did not bind the town. In that case, however, the absence of the seals was patent to every purchaser, and the bonds, upon their face, carried evidence to purchasers that the agents of the town had not executed their authority in the manner prescribed by law. Here, however, the purchaser had the right to assume, from the recitals in the bonds, over the signatures of the commissioners, that, when the bonds were issued, they were duly sealed.

The general doctrine, undoubtedly, is, that a municipal corporation, being the creature of the law by which it is created, can act only in the manner provided by its organic law, and, if its agents fail to observe the forms and methods prescribed by that law, in any substantial particular, their acts are not the acts of the corporation. This doctrine, however, has been greatly modified by the decisions of the Courts of the United States, in its application to municipal bonds issued by agents of municipal corporations, when the rights of *bona fide* purchasers are involved. As is said in one of the latest cases in the Supreme Court of the United States, a *bona fide* purchaser of municipal bonds "takes the instrument freed

from all infirmities in its origin, unless it is absolutely void, from want of power in the maker to issue it." (*Cromwell v. County of Sac*, 96 U. S., 51.) The bonds in suit were not void for want of power in the agents to issue them, but were only invalid because the power was exercised irregularly.

Assuming, also, for present purposes, that the officers of the railroad company negotiated the bonds after their delivery, in contravention of the agreement upon which they were delivered, these facts do not justify granting a new trial. Proof of facts, amounting to a fraudulent diversion of the bonds, would impose on the purchaser the burden of showing a purchase for value, and without notice. He could not rest upon the presumption derived from the possession of the coupons; and the only effect of the newly-discovered evidence, in this case, would be to shift the burden of proof, and not to change the result of the controversy.

For these reasons, the motion is denied.

*James F. Starbuck*, for the plaintiff.

*George F. Danforth*, for the defendant.

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HELEN S. ROBINSON

vs.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.,

When the parties to an action at law have stipulated in writing to refer it to a referee, "to hear, try and determine the issues therein, and that an order may be entered accordingly," and, without such order being entered, the trial before the referee has been had, and he has made his report, such order will be considered as having been entered, and may be entered *nunc pro tunc*. The stipulation is to be regarded as referring to the practice of the Courts of the State in respect to references by consent.

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Robinson v. The Mutual Benefit Life Insurance Company.

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A reference, by consent, of such an action, in this Court, is lawful.

After a trial before a referee, under such a stipulation, the Court has the power to grant a new trial.

What is a sufficient conformity, in practice, in this Court, to the practice of the Courts of the State, in respect to the review of a trial before a referee.

A New Jersey life insurance company issued, at Rochester, New York, a policy insuring the life of R., in a sum named, for life, making the sum payable to the wife of R., "or assigns." The policy was to cease, if the annual premium should not be punctually paid. R. and his wife resided, at the time, at Rochester. Afterwards, R. and his wife assigned the policy to M., with the assent of the company. The assignment was, by its terms, absolute, but was intended by the parties as collateral security to M. for any premium he should thereafter pay on the policy. The annual premiums which became due after the assignment, down to the death of R., were paid to the company by M. The company paid to M. the sum insured. Afterwards, M. paid to the widow of R. a certain sum, under an agreement with her that she should receive it in full satisfaction of her interest in the policy. Afterwards, the widow sued the company to recover the sum insured, claiming that the assignment of the policy was void, under the Acts of the Legislature of New York, of April 1st, 1840, April 14th, 1858, March 28th, 1862, and April 18th, 1866, (*Laws of New York*, 1840, *chap.* 80, *p.* 59, and 1858, *chap.* 187, *p.* 306, and 1862, *chap.* 70, *p.* 214, and 1866, *chap.* 656, *p.* 1,413,) respecting insurances of the life of a husband for the benefit of his wife: *Held*, that such assignment was valid, and that the plaintiff was not entitled to recover.

There is no decision of the Courts of New York holding that such an assignment of such a policy is not valid.

The cases of *Eadie v. Slimmon*, (26 *N. Y.*, 9,) and *Barry v. The Equitable Life Society*, (59 *N. Y.*, 587,) and *Wilson v. Lawrence*, (8 *Hun*, 593, and 13 *Hun*, 238, and 76 *N. Y.*, 585,) examined.

The agreement of the plaintiff with M., and her receipt of the money from him, was a ratification of his authority to collect from the company the amount insured.

(Before BLATCHFORD, J., Northern District of New York, April 19th, 1879.)

BLATCHFORD, J. The defendant, a New Jersey corporation, engaged in the business of insuring lives, issued, on the 5th of February, 1858, a policy of insurance, which set forth that the company, in consideration of \$63 30 paid to them by Helen S. Robinson, (the plaintiff,) and of the annual premium of \$63 30 to be paid on or before 12 o'clock M., on the 5th of February, in every year during the continuance of the policy, assured the life of Homer G. Robinson, in the amount of \$3,000, during the term of life. It also set forth as follows:

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Robinson v. The Mutual Benefit Life Insurance Company.

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“ And the said company do hereby promise and agree, to and with the said assured, well and truly to pay, or cause to be paid, the said sum insured, to the said Helen S. Robinson, or assigns, within ninety days after due notice and proof of the death of the said Homer G. Robinson. And in case the said assured should die before the decease of the said Homer G. Robinson, then the amount of this insurance shall be payable to their children, or to their guardian, if under age, within ninety days after due notice and proof of interest, and of the death of the said Homer G. Robinson. \* \* \* And it is also understood and agreed by the within assured, to be the true intent and meaning hereof, that, \* \* \* in case the said assured shall not pay the said annual premiums on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine. And it is further agreed by the within assured, that, in every case where this policy shall cease, or become or be null or void, all previous payments made thereon, and all profits, shall be forfeited to the said company; and that, if assigned, written notice to be given to the company, and the party to whom the policy is transferred must sign all premium notes with the assured.”

This suit is brought on the policy by Helen S. Robinson, named in it, to recover the \$3,000, with interest from May 15th, 1877. The plaintiff was the wife of Homer G. Robinson, named in the policy. They both resided at Rochester, New York. He died on the 18th of January, 1877, at Rochester. The complaint alleges that the plaintiff caused due notice and proof of his death to be given to the defendant more than ninety days previous to the commencement of this suit, and on or before February 15th, 1877, “ and that the proofs of same have been duly accepted and acted upon by the said defendant by payment of the amount of said insurance, but not to this plaintiff.”

The answer sets up, that, on the 6th of March, 1868,

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*Robinson v. The Mutual Benefit Life Insurance Company.*

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the plaintiff assigned the policy to Mortimer C. Mordoff; that, on the 24th of January, 1877, Mordoff, by and under the direction of the plaintiff, caused to be duly served on the defendant proofs of loss and death of Homer G. Robinson and returned to the defendant the policy of insurance, receipted in full, whereupon the defendant paid to Mordoff the amount due thereon; and that such payment was duly authorized by the plaintiff and she has received the proceeds thereof. It sets up, as a further defence, that, prior to the commencement of this action, and on or about April 21st, 1877, the defendant paid the plaintiff in full for all claim on the policy.

This suit was commenced in the Supreme Court of New York and was removed into this Court. The complaint was put in in the State Court and the answer in this Court. After answer, the parties stipulated in writing, on the 11th of July, 1878, that the cause be referred to F. A. Macomber, Esq., "to hear, try and determine the issues therein, and that an order may be entered accordingly." No order of reference has ever been entered, but the parties proceeded to try the cause before the referee. The report of the referee was filed on the 26th of November, 1878. It states that the referee has heard the proofs and allegations of the respective parties, and that, from such proofs, he finds the following facts: "The defendant, a corporation duly organized under the laws of the State of New Jersey, and doing business, among other places, in the State of New York, upon proper application therefor, for the consideration, therein expressed, of \$63 30, and an agreement to pay a like sum to the defendant in every year thereafter, during the continuance of the policy, duly issued, on the 5th day of February, 1858, to the plaintiff, at Rochester, N. Y., a policy of insurance, whereby it did assure the life of Homer G. Robinson, of Rochester, N. Y., in the sum of three thousand dollars, for the term of his natural life, and whereby the defendant promised and agreed to pay, or cause to be paid, the said sum to the said plaintiff, or her assigns, within ninety days after

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Robinson v. The Mutual Benefit Life Insurance Company.

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due notice and proofs of the death of the said Homer G. Robinson, and whereby, in case the said assured should die before the decease of the said Homer G. Robinson, the amount of said insurance should be payable to the children of the said Homer G. Robinson and the plaintiff, or to their guardian, if under age, within the like period. On the 6th day of March, 1868, the said plaintiff and the said Homer G. Robinson, by an instrument partly printed and partly written, assigned, transferred and set over unto one Mortimer C. Mordoff, the above-named policy of insurance, and all moneys, interest, benefit and advantage whatever, then due, or thereafter to arise, or to be had or made, by virtue thereof, and the said defendant, on the 14th day of March, 1868, duly assented to such transfer in writing. Though the said assignment was absolute and unconditional in its terms, it was, nevertheless, intended by the parties thereto as collateral security to the said Mordoff for any premium which he should thereafter pay upon said policy of insurance, but the defendant had no knowledge or information of the scope or nature of said assignment, except as expressed by the written and printed terms of said assignment. The annual premiums provided for by said policy were, after the assignment of said policy as aforesaid, duly paid to the defendant by the said Mortimer C. Mordoff, as such assignee, down to and including the premium due and payable on the 5th day of February, 1876, amounting in all to the sum of about \$500. The said Homer G. Robinson died at the city of Rochester, New York, on the 18th day of January, 1877. Proofs of loss were duly presented to the defendant by Mortimer C. Mordoff, assignee as aforesaid, on or about the 24th day of January, 1877, and he received from said defendant, on or about the 21st day of April, 1877, payment in full on the said policy, less the sum of about three hundred dollars reserved by said defendant to meet the notes of said Mordoff given in part payment for premiums. After the death of the said Homer G. Robinson, the said Mordoff being then insolvent and in bankruptcy, and claiming to the plaintiff and her

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Robinson v. The Mutual Benefit Life Insurance Company.

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counsel that he had advanced to the plaintiff for her benefit and support large sums of money other than the payment of the premiums as aforesaid, entered into an oral agreement with the plaintiff and her counsel, whereby he, the said Mordoff, was to pay unto the plaintiff, and the plaintiff was to receive from him, in full satisfaction of her interest in and to said policy, the sum of one thousand dollars, and, from time to time between the 2d day of May, 1877, and the 13th day of September, 1877, the plaintiff did receive of the said Mordoff, of the said moneys so collected by him, the sum of \$700, and, on or about the 9th day of November, 1877, the said Mordoff offered to pay the plaintiff the remaining \$300 thereof, which the plaintiff refused to receive, in full settlement of her claim for the said moneys collected by him of the defendant. The said Homer G. Robinson left him surviving three infant children, besides his widow, the plaintiff in this action. No part of the sum secured by the policy has been paid by the defendant to the plaintiff, except as hereinbefore stated." Upon the foregoing facts, so found, the referee found, as conclusions of law: "1st. That the assignment, by the plaintiff, of the said policy to the said Mordoff, for the purpose of securing the payment of premiums thereon, was valid. 2d. That the plaintiff, having received at the hands of said Mordoff a portion of the moneys secured by said policy, is estopped from denying the validity of said assignment. 3d. That the plaintiff's complaint be dismissed.

The plaintiff, in due time, and prior to any report or findings by the referee, filed with the referee written requests that the referee would find, from the evidence, as follows: (1.) That the assignment to Mordoff must be governed by the laws of the State of New York; (2.) That the said assignment was null and void; (3.) That, prior to the payment of the money to Mordoff, he had no authority from the plaintiff to receive it for her; (4.) That Mordoff was in no sense the agent of the company to pay or compromise the claim; (5.) That Mordoff was not the agent of the company for any pur-

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Robinson v. The Mutual Benefit Life Insurance Company.

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pose, nor did he claim to be acting for it; (6.) That Mordoff was in no sense the agent of the plaintiff nor did he claim to be acting for her, either before or after receiving the money from the defendant; (7.) That all that was done, as between the plaintiff and Mordoff, was done under and by virtue of the assignment alone; (8.) That the plaintiff has never entered into any agreement with the defendant to take less than the amount of her claim; (9.) That the defendant has never paid the plaintiff any portion of the amount due upon said policy. The referee, in connection with the findings in his report, declined to find one way or the other on the foregoing requests, except as found or necessarily implied in his report.

The plaintiff, in due time, filed exceptions "to the report and conclusions of law" of the referee, "and to each and every part thereof." These exceptions embrace three several exceptions to the three several conclusions of law, and an exception to the refusal of the referee to find as requested in said requests "and each and every thereof."

The plaintiff, on the pleadings and proceedings in the cause, and on a case containing the evidence and proceedings before the referee, now moves the court to set aside the report of the referee, and for a new trial. The defendant contends that the Court has no power to grant a new trial in this case. It is apparent that the case must be considered as if an order of reference, in pursuance of the stipulation to refer, had been entered thereon at the time the stipulation was made. Either party is entitled now to have such order entered *nunc pro tunc*. The parties, in stipulating in writing to refer the cause to Mr. Macomber, "to hear, try and determine the issues therein," must be held to have referred to the practice of the Courts of the State in regard to references by consent. Such a reference, by consent, of all the issues in an action, is provided for by § 1,011 of the Code of Civil Procedure of New York. By § 1,023 such requests to find as were made by the plaintiff in this case, are provided for. Provision is also made by the said Code, (§ 992,) for exceptions to the ruling of a referee on a question of

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Robinson v. The Mutual Benefit Life Insurance Company.

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law arising on the trial of an issue of fact, and it is declared, (§ 993,) that, on the trial of an issue of fact by a referee, a refusal to make any finding whatever upon a question of fact, where a request to find thereupon is seasonably made, or a finding without any evidence tending to sustain it, is a ruling upon a question of law, within the meaning of § 992. It is also provided, (§ 994,) that, where an issue of fact is tried by a referee, an exception to a ruling, upon a question of law, made after the cause is finally submitted, may be taken within a prescribed time and in a prescribed manner, after the report of the referee is made. Provision is also made by said Code for a review by the Court of rulings so excepted to. The fact that, in a given case, under the State practice, the review is to be by an appeal to the general term of the Court in which the suit is pending, from a final judgment rendered upon a trial by a referee, and that such appeal may • be taken upon questions of law, or upon the facts, or upon both, as provided by § 1,346 of said Code, is of no importance. There is no general term of this Court, and the statutes of the United States do not provide for any specific appeal or form of review, in this Court, in respect of a trial before a referee, of a suit pending in this Court. The conformity in practice and forms and modes of proceeding in a civil suit at common law in this Court, to the practice and forms and modes of proceeding in like causes in the Courts of record of the State, required by § 914 of the Revised Statutes, is only required to be a conformity "as near as may be." References by consent are authorized in this Court in cases like the present. (*Alexandria Canal Co. v. Swan*, 5 Howard, 89; *York, &c., R. R. Co. v. Myers*, 18 Howard, 246; *Heckers v. Fowler*, 2 Wallace, 123.) Provision is made by § 649 of the Revised Statutes, for the trial and determination by the Court of issues of fact in civil cases in a Circuit Court, without the intervention of a jury, when a stipulation in writing waiving a jury is filed, and it is declared that "the finding of the Court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

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Robinson v. The Mutual Benefit Life Insurance Company.

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Provision is also made, by § 700, for the making of a bill of exceptions, on such trial by the Court, presenting the rulings of the Court in the progress of the trial, and the exceptions thereto, and for the review of such rulings by the Supreme Court, on writ of error or appeal. It is also provided, by § 726, that all the Courts of the United States "shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been generally granted by the Courts of law." The practice of the Courts of the State, in regard to references, and reports and reviews thereof, in the particulars above mentioned, under the present Code of Civil Procedure, are not substantially different from the prior practice under the prior Code and the decisions thereunder. In view of such practice and of the provisions of the statutes of the United States, this Court, in June, 1876, (13 *Blatchf. C. C. R.*, 569,) made a rule in these words: "In actions at law, a consent to a reference of the whole issue must likewise contain a provision that judgment shall not be entered until after ten days' notice of the filing of the report of the referee and of the judgment proposed to be entered thereon. After a reference, at any time before the entry of judgment, either party may move for a new trial upon a case or exceptions, and, if such motion be denied, the decision of the motion and the questions involved in it may be entered on the record, as if it had been a ruling made upon a trial by the judge without a jury, and excepted to in like manner. When a motion for a new trial is intended to be made, the Court may extend the time for entering judgment, upon the application of the moving party, and may stay all other proceedings until the decision of the motion." A like rule was made in the Circuit Court for the Southern District of New York, in February, 1877. (13 *Blatchf. C. C. R.*, 568.) There is no doubt of the power of the Court to grant a new trial where the case has been tried by a jury. Consent to a trial by the Court carries with it power to the Court to grant a new trial. Consent to a trial by a referee carries with it power to the Court to grant a new trial. The

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Robinson v. The Mutual Benefit Life Insurance Company.

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consent in this case was made in view of the rule of June, 1876. The Court had power to make such rule. The provision therein made for moving for a new trial, before judgment, after a reference by consent, is a conformity "as near as may be" to the State practice, in connection with the statutes of the United States.

The case of *Neafie v. Cheesebrough*, (14 *Blatchf. C. C. R.*, 313,) does not apply to the present case. In that case, a judgment had been entered, on the report of a referee appointed by consent, to hear and determine all the issues. The Court held that it had no authority, *after judgment*, to grant a new trial of a cause tried by a referee, and that the case was not one specially provided for by § 987 of the Revised Statutes, authorizing a petition for a new trial after judgment, because the judgment was not entered on a verdict, or on a finding of the Court on the facts. In the present case, there has been no judgment entered.

It follows, that this Court has power to entertain this motion.

The referee finds, that the assignment of the policy to Mordoff was intended, by the parties thereto, as collateral security to Mordoff for any premium which he should thereafter pay upon the policy; that, after such assignment, the annual premiums provided for by the policy were duly paid to the defendant by Mordoff, as such assignee, down to and including the last premium which became due, amounting, in all, to about \$500; and that such assignment, for the purpose of securing the payment of premiums on the policy, was valid. It is contended, by the plaintiff, that the interest which she had in the policy, at the time it was assigned, was absolutely inalienable for any purpose, and that the assignment of it was absolutely void. The policy was made February 5th, 1858. The assignment was made March 6th, 1868.

The policy in question was issued while the statute of New York, passed April 1st, 1840, (*Laws of New York*, 1840, *chap.* 80, *p.* 59,) was in force. That statute was in these words: "§ 1. It shall be lawful for any married woman, by

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Robinson v. The Mutual Benefit Life Insurance Company.

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herself and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and, in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable, by the terms of the insurance, shall be payable to her, to and for her own use, free from the claims of the representatives of her husband, or of any of his creditors; but such exemption shall not apply where the amount of premium annually paid shall exceed three hundred dollars.

§ 2. In case of the death of the wife before the decease of her husband, the amount of the insurance may be made payable, after her death, to her children, for their use, and to their guardian, if under age." Some of the provisions of the policy, in the present case, would appear to have reference to some of the provisions of this statute, although the defendant is a New Jersey corporation, and the amount insured is made payable to "Helen S. Robinson, or assigns." The statute says, that the married woman may cause her husband's life to be insured, "for her sole use;" and that, if she does so, then, if she survives her husband, the insurance money payable, by the terms of the insurance, (one of which terms is, that the insurance shall be made "for her sole use,") shall be payable to her for her own use, free from the claims of the representatives or creditors of her husband. The second section of the statute provides, that the policy may make the insurance money payable to her children, for their use, and to their guardian, if they are under age, in case the woman dies before her husband dies. This section may have been looked to in the provision in this policy respecting the death of Helen S. Robinson before the death of Homer G. Robinson. But the second section has reference only to a policy where the insurance is such an insurance as the first section provides for, namely, a policy containing an insurance for the sole use of the woman. The present policy is not, in terms, a policy for the "sole use" of the woman, because, on its face, she and the company contract with each other, that, in case she sur-

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Robinson v. The Mutual Benefit Life Insurance Company.

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vives her husband, the amount of the policy shall be payable to her, if she has not assigned the policy, and to her assignee, if she has assigned it.

On the 14th of April, 1858, (*Laws of New York*, 1858, chap. 187, p. 306,) an Act was passed amending the Act of 1840, in the following particulars—changing the words “her husband,” where they occur the third time, in § 1, to “the husband,” and, after the words “annually paid,” in § 1, inserting the words, “out of the funds or property of the husband.” In all other respects the Act of 1840 was re-enacted. On the 28th of March, 1862, (*Laws of New York*, 1862, chap. 70, p. 214,) an Act was passed amending § 2 of the Act of 1858, (which was precisely like § 2 of the Act of 1840,) so as to read thus: “The amount of the insurance may be made payable, in case of the death of the wife before the decease of her husband, to his or to her children, for their use, as shall be provided in the policy of insurance, and to their guardian, if under age.” On the 18th of April, 1866, (*Laws of New York*, 1866, chap. 656, p. 1,413,) an Act was passed amending the Act of 1858, in the following particulars—striking out the words “her husband,” where they occur the second time, in § 1, and inserting, in their place, the words “such period or term;” and amending § 2, as found in the Act of 1862, by striking out the words, “decease of her husband, to his or to her,” and inserting in their place the words, “before the period at which it becomes due, to her husband, or to his, her or their.” This was all the legislation on the subject before the assignment in this case was made, on the 6th of March, 1868. There was no other restriction on the assignability of the policy than what is to be implied from the language above cited, and the statutes, by their terms, apply wholly to policies where the woman causes the life of her husband to be insured “for her sole use,” and do not, by their terms, apply to policies where the contract provides that the insurance money shall, if the husband dies before the wife, be paid to her “or assigns.” The statute provides, that, where the insurance is effected by the woman “for her sole use,” the representatives and creditors



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Robinson v. The Mutual Benefit Life Insurance Company.

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any consideration going to the wife or to her separate estate. The defendant had been in possession of the policy from the time of the assignment, and had paid the annual premium thereon for two successive years. The judgment was that the defendant be paid the amount of the two premiums paid by him, with interest, and that the plaintiff receive the remainder of the fund. On appeal, the general term reversed the judgment on the fact and the law, and ordered a new trial. The plaintiff appealed to the Court of Appeals. That Court had the case before it twice. On the first occasion the Court held that the assignment was void because obtained by undue influence; and a majority of the Court held, that the policy was issued and taken under the Act of 1840 and was not assignable. A motion for a re-argument was made, and the Court held, that the defendant's only title to the money was founded on the assignment; that the validity of the assignment was in issue; that a wife insured under the Act of 1840 could not assign her policy as though it were realized personal property, or an ordinary security for money; that the non-assignability of the policy appeared on its face; and that the motion for a rehearing ought to be denied.

In *Barry v. The Equitable Life Society*, (59 N. Y., 587,) a New York corporation, in May, 1868, when the legislation of New York was the same as in the present case, issued to the plaintiff, the wife of one Barry, on his application, a policy of insurance on his life, for the sole use of the plaintiff. The policy stated that it was issued in conformity with the Act of 1840, as amended, and by it the company agreed to pay the amount of the insurance, \$10,000, to the plaintiff, "for her sole use," if living, in conformity with the statute, and, if not living, to the children of Barry, or their guardian, for their use. The plaintiff, in July, 1871, on the procurement of Barry, signed a blank assignment of the policy, under duress and coercion, and never received any consideration for signing it. The assignment was afterwards filled up and delivered to the defendant Brune, by Barry, as collateral security to Brune for a debt of Barry's firm to Brune. Brune as-

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Robinson v. The Mutual Benefit Life Insurance Company.

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signed the policy to the defendant Whitredge in February, 1872, and Barry died in March, 1872. The plaintiff brought the suit to determine the conflicting claims of herself and the defendants Brune and Whitredge to the \$10,000. The special term and the general term of the Supreme Court gave judgment for the plaintiff. Brune and Whitredge appealed to the Court of Appeals. Of the eight judges of that Court five sat in the case. All of the five concurred in affirming the judgment on the ground of coercion. Three of the judges (Church, Ch. J., Allen and Andrews) concurred in the view, that the policy was issued with an eye to the provisions of the Act of 1840, as amended in 1858, 1862 and 1866; that it was expressed to be in conformity to the statute; that the terms of the contract, to pay on the termination of the life insured, were in close pursuance of the provisions of the Act; that the Act, as amended, was still operative, notwithstanding the subsequent legislation enlarging the legal status of married women; and that there was no subsequent legislation taking the place of that in the Act of 1840, exempting the insurance money from the claim of the personal representatives and creditors of the husband whose life had been insured in accordance with its enabling provisions. The opinion (Folger, J., stating the views of the Court) adds: "This being so, the majority of the judges taking part in the decision feel not only bound to follow *Eadie v. Slimmon*, (26 N. Y., 9,) upon the principle of *stare decisis*, but as convinced that the decision of that case was correct in its result." The opinion then states, that the decision in *Eadie v. Slimmon* went (in its denial of a motion for re-argument) on several grounds. It states those grounds, and, among them, the last, "that the Act was special and peculiar, and looked to a provision for a state of widowhood and orphanage; and that it would be a violation of the spirit of the provision, to hold that a wife insured under that Act could sell or traffic with her policy as though it were realized personal property or an ordinary security for money." The opinion then proceeds thus: "Upon this latter ground, the majority of the judges

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Robinson v. The Mutual Benefit Life Insurance Company.

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taking part in this decision now put their assent to *Eadie v. Stimson*, and upon that ground also are for the affirmance of the judgment in this case. Without that Act, when this policy was issued, the insurance money, being for premiums paid out of the funds or property of the husband, could not have been retained from the personal representatives or creditors. That Act sought that result, not for the sake of the woman while a wife, but when a widow; not that she might sell or assign the contingency which was created by the policy, but that it should be kept for her until, by the death of her husband, she surviving, it became realized personal property; or, for the children, when, by his death, after surviving her, it became realized personal property to them surviving. The majority of the judges taking part think that this is the policy and intention of the Act and that it still exists; that the contract for insurance was issued under it and is controlled by it; and that the power of disposition over it is and should be restricted so as to be in accordance therewith. They further think, that the subsequent legislation, enlarging the legal capacity of married women, does not supersede the Act of 1840, nor give them other power to deal with a policy issued under it, than they had by it. \* \* \* The minority do not think the determination of this question necessary to a decision of the case, and, doubting whether the effect of the married woman's Act is not more sweeping than here allowed to be, express no opinion."

In *Wilson v. Lawrence*, (8 *Hun*, 593,) the plaintiff, the widow of one Wilson, brought suit against an insurance company to recover \$2,500, the amount of a policy of life insurance on the life of her deceased husband. The policy was issued in October, 1868. It recited that it was made in consideration of a premium paid by the plaintiff to the company, and insured the life of the husband, for life. In it the company agreed "with the said assured, her executors, administrators or assigns," to pay the sum insured "to the said assured, her executors, administrators or assigns." The policy was assigned, by the plaintiff, to one Lawrence, in April, 1873.

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Robinson v. The Mutual Benefit Life Insurance Company.

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The husband died in September, 1875. The Acts of 1858 and 1866 had been amended by the Act of April 18th, 1870, (*Laws of New York*, 1870, chap. 277, p. 612,) but not so as to affect that case. Lawrence was substituted as a defendant in the suit, in place of the company, and the latter paid the money into Court. It appeared, on the trial, that the plaintiff paid the premiums on the policy. The special term of the Supreme Court gave judgment for the plaintiff. On appeal, the general term reversed the judgment. One ground of reversal was, that the plaintiff had no proper complaint. Another was, that, as the special term had found that the policy was assigned by the plaintiff to Lawrence, for a consideration of \$2,000 paid by him to her and her husband, it was not proper to restore the policy to the plaintiff, and declare the assignment invalid, without requiring her to restore the \$2,000 to Lawrence, and that, therefore, it was error to award any more of the fund in Court to the plaintiff than the excess over the \$2,000, and interest. The Court stated, that this view proceeded on the assumption, that, as the plaintiff, before the assignment of the policy, was its absolute owner, she must have received the \$2,000 to her own use. The case was tried again. The second report of it is in 13 *Hun*, 238. The plaintiff claimed that the assignment was procured by coercion, and that it was void, on the ground that her interest in the policy was not assignable. The special term found that the assignment was not procured by coercion, but it held the assignment void, on the ground that the plaintiff's interest was not assignable, and judgment was ordered for the plaintiff, entitling her to the money in Court. The special term found, as facts, that nothing was paid to the plaintiff on the assignment, and that the only consideration for it was the cancellation and delivery to the plaintiff's husband, of his promissory notes for \$2,000 held by the defendant. On appeal, the general term held, that the finding as to the consideration did not change the equity of the case as to the restoration to the defendant of that with which he had parted, but that, if the assignment was absolutely void, such equitable

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Robinson v. The Mutual Benefit Life Insurance Company.

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view was of no moment. The Court proceeded to discuss the question as to whether the policy was made under the Act of 1840. The opinion says: "It does not refer to the Act in terms, and its only provision respecting payment is, that the company will pay to the assured, (the plaintiff,) her executors, administrators or assigns. The policy purports to be a contract with the wife, and it recites the payment of the first premium by her. On its face, it is a policy which would have been valid at common law, which recognized an insurable interest of a wife in the life of her husband. But the Court found, on the last trial, that the policy was issued upon the application of the husband, and that he paid all the premiums. Those circumstances, and the fact that the policy was not payable till his death, warranted the further finding of the trial Court, that the husband designed the policy as a provision for the support of the plaintiff during widowhood. The policy is, therefore, to be regarded as within the equity of the statute, and, consequently, not assignable. The circumstance, that the policy made no provision for children, does not militate against the idea that it was made in view of the statute, as there is no evidence that the plaintiff or her husband had children. These views do not conflict with the decision on the first appeal, as it there appeared that the premiums were paid by the wife." The judgment was affirmed. The defendant then appealed to the Court of Appeals. That Court recently affirmed (76 *N. Y.*, 585) the judgment of the general term. The whole of the opinion delivered by it was in these words: "We think that this case is governed by the decisions in *Eadie v. Slimmon*, (26 *N. Y.*, 9,) and *Barry v. Brune*, (59 *N. Y.*, 587.) Upon the authority of those cases, the policy in question must be held to have been inalienable, and the assignment to Mr. Lawrence absolutely void. The judgment is affirmed." I have been furnished with copies of the record and of the briefs presented to the Court of Appeals. The record shows that the special term found as facts: (1.) That the policy was issued for the sole use and benefit of the plaintiff; (2.) That it was issued on the application of the

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Robinson v. The Mutual Benefit Life Insurance Company.

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husband, and on the payment by him of the premium due at the time it was issued; (3.) That all the premiums payable during the husband's life were paid by him; (4.) That the insurance was designed by him as a provision for the support of the plaintiff, in the event of his death, and during her widowhood; (5.) That the assignment was made in payment of a debt of \$2,000 from the husband to Lawrence; (6.) That the policy was delivered to Lawrence, and he surrendered to the husband the evidences of the debt; (7.) That the plaintiff never received any consideration for the assignment. The Court found, as conclusions of law: (1.) That the policy was not assignable; (2.) That the assignment was void; (3.) That the plaintiff was entitled to the money in Court. The defendant excepted to the above findings of fact, 1, 4 and 7, and to the three conclusions of law. The Judge, at special term, in his opinion, held, that the case fell within the statutes, and within the cases in 26 *N. Y.* and 59 *N. Y.*, because (1.) the husband arranged for the insurance; (2.) the husband paid all the premiums during his lifetime; (3.) the wife assigned the policy, at her husband's request, to pay an existing debt of his, she receiving no consideration therefor. The general term, as we have seen, (13 *Hun*, 238,) proceeded on the same grounds. The opinion of the Court of Appeals must be held to have proceeded on the same views. The plaintiff's counsel, in his brief before the Court of Appeals, contended that the policy fell within the statutes, as a provision made by the husband for the wife's widowhood, because it fell within the provisions which permitted the husband to pay the premiums for the insurance from his own property, and which exempted the insurance so effected from the claims of his creditors. Stress was laid on the fact that the husband paid all the premiums due on the policy, both before and after the transfer to the defendant, as making the policy non-assignable by the wife.

None of the cases above cited are like the present case. In *Eadie v. Slimmon* the policy was assigned as security for a debt of the husband's, and not for any consideration going

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Robinson v. The Mutual Benefit Life Insurance Company.

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to the wife or to her separate estate. The same fact existed in *Barry v. The Equitable Life Society*, and, in that case, in the opinion of the Court of Appeals, the statute and the case of *Eadie v. Slimmon* are referred to as applying only to cases where the premiums are paid out of the funds or property of the husband. In *Wilson v. Lawrence*, the only consideration for the assignment was the payment of a debt of the husband's, and the husband paid all the premiums. In the report of the case of *Barry v. The Equitable Life Society*, at special term, (14 *Abbott's Pr. Rep.*, new series, 385,) it is stated, in the decision of Judge Van Brunt, that all the premiums were paid by the husband. Assuming that the policy in the present case was a New York contract and fell within the statutes of New York, there is no decision of the Courts of New York holding that such an assignment as was made in the present case, of such a policy as the one under consideration, is not valid.

In *Conn. Life Ins. Co. v. Burroughs*, (34 *Conn.*, 305, 313,) the Court comments on the decision in *Eadie v. Slimmon* and says that the reasoning "seems to go so far as to hold, that a policy of this description, prior to the decease of the husband, is absolutely and under all circumstances unassignable by the wife." It adds: "That such should be the law applicable to a policy the premiums on which were paid by the husband, certainly seems reasonable and just; while, on the other hand, if the wife paid the premiums from her own separate estate, it is difficult to suggest a reason why she should not have the same power to assign her interest in the policy that she has to assign any other chose in action belonging to her."

The policy of the statutes of New York, as interpreted by the highest Court of New York, while it requires that the assignment in the present case, if made to pay or secure a debt of the husband's, should not be upheld, does not forbid the assignment by the wife, when the object of the assignment is to keep the policy alive by insuring the payment of the premiums as they recur. In the present case,

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Robinson v. The Mutual Benefit Life Insurance Company.

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the evidence shows that that was the real object of the assignment and that the assignee carried out strictly and in good faith his agreement. As the wife survived her husband, no rights of any children intervene. The question is one solely between her and rights arising under the assignment, whether, as against her, such rights are valid. It would be a very inequitable interpretation of a statute the object of which is to secure life insurance money exclusively for the benefit of the wife, to hold that she cannot assign the policy for the purpose of keeping it in life. In the absence of fraud or coercion in procuring the assignment, it would be enabling her to perpetrate a fraud, if, as against the assignee and the insurance company who have acted in good faith thereon, it should be held that she could recover the amount of the policy from the company, in a case like the present. Not only is the policy payable to her "or assigns," but it provides that it shall cease if the annual premiums shall not be punctually paid, and that in such case all previous payments of premiums and all profits shall be forfeited to the company. On all the facts in this case, the assignment must be held to have been valid, according to its terms, so as to be a defence to the claim now made by the plaintiff, upon the policy, against the company. If, as between the plaintiff and Mordoff, he was her trustee of the money after he received it from the company, and liable to account to her for it, subject to his claims upon it, both as having paid the premiums upon it, and as her creditor otherwise, yet, as between her and the company, the assignment was a full authority from her to Mordoff to collect the money for her from the company and a full authority from her to the company to pay it to Mordoff. Aside from this, she, with full knowledge of the fact that Mordoff had collected the money from the company on the policy, under and by virtue of the assignment, ratified such receipt of the money by Mordoff, in such manner as to be estopped from denying, as against the company, the validity of the authority of Mordoff to receive the money. Her right of action on the policy, in this suit, is

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Robinson v. The Mutual Benefit Life Insurance Company.

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gone. She received a part of the money, as a part of the money paid by the company. She does not offer to return it to the company. Her acts were such as to amount to a ratification of the whole transaction, at a time when she was called upon to repudiate it, if she were ever to do so. (*Story on Agency*, §§ 239, 242, 250.) The ratification enured to the benefit of the company. (*Id.*, § 244.) The present is not a suit between the plaintiff and Mordoff, as to the disposition which ought, as between her and him, to be made of the money received from the company. The contest was precisely of that character in the three cases in the New York Court of Appeals. The question in the present case is solely whether the company ought to pay a second time to the plaintiff the money which it paid to Mordoff.

There is no proper ground, in the evidence, for interfering with the findings of fact made by the referee, nor was there any error in the refusal of the referee to find one way or the other on the requests to find made by the plaintiff, except as found or necessarily implied in his report. The exceptions to the rulings of the referee in the course of the trial have been examined, and no ground is found, in any of them, for granting a new trial.

Judgment will be entered for the defendant, on the report of the referee, with costs.

*J. E. Roe*, for the plaintiff.

*James B. Perkins*, for the defendant.

## FREDERICK BUTTERFIELD AND OTHERS vs. CHESTER A. ARTHUR.

"Calf-hair goods," made to imitate velvet or fur, manufactured of cotton and hair, the warp being cotton and the woof being cattle hair, is not dutiable at the rate of 30 *per cent. ad valorem*, as "a manufacture of hair, not otherwise provided for," under Schedule M, of § 2,504 of the Revised Statutes, but is dutiable at the rate of 35 *per cent. ad valorem*, as "a manufacture of cotton, not otherwise provided for," under Schedule A, of said § 2,504, by applying to it the provisions of § 2,499 of the Revised Statutes.

(Before WALLACE, J., Southern District of New York, April 19th, 1879.)

WALLACE J. The plaintiffs, in November, 1874, imported into the port of New York certain merchandise invoiced as "calf-hair goods," upon which the defendant, as collector of the port, exacted a duty of thirty-five *per centum ad valorem*, it being claimed by the collector that the merchandise was dutiable as "a manufacture of cotton, not otherwise provided for," under Schedule A, of § 2,504 of the Revised Statutes of the United States. The plaintiffs protested against the payment of the duty thus exacted, and now insist that their merchandise should have been classified as "a manufacture of hair, not otherwise provided for," and, as such, was subject to a duty of only thirty *per centum ad valorem*. This suit is brought to recover the difference between thirty-five and thirty *per centum ad valorem*.

The provision of the tariff Acts upon which the plaintiffs found their claim is contained in Schedule M, of § 2,504 of the Revised Statutes, by which duties are imposed as follows: "On hair-cloth known as crinoline cloth, and all other manufactures of hair, not otherwise provided for, thirty *per centum ad valorem*; of the description known as hair-seating, eighteen inches wide or over, forty cents per square yard; less than eighteen inches wide, thirty cents per square yard."

The evidence shows that the plaintiffs' importation is a fabric made to imitate velvet or fur, manufactured of cotton

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Butterfield v. Arthur.

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and hair, the warp being cotton and the woof being cattle hair. It is used for making caps, cloaks and outside garments. It is known in the trade under the general name of "cow or calf-hair goods," or as "velour," "imitation seal skin," &c., &c. "Crinoline cloth" is made of cotton and hair, the long hair from the tail or mane of the horse being woven into a cotton warp. The width of the cloth is governed by the length of the hair used; and it is used for ladies' underwear. "Hair-seating" is a similar fabric to crinoline cloth, the only difference being that it is more closely woven; and it is used mainly for upholstering purposes.

If the plaintiffs' article was a manufacture of hair, within the meaning of the Act in question, it was an enumerated article, and the collector had no right to apply the provisions of § 2,499 of the Revised Statutes. That section enacts, that, on all articles manufactured from two or more materials, the duty is to be assessed at the highest rates at which any of its component parts may be chargeable; but that section only applies to non-enumerated articles. It affords a rule of construction by which articles not otherwise enumerated may be ranged under the proper classification.

It is insisted, for the plaintiffs, that, because their article derives its main value and peculiar character from the hair of which it is in part composed, it is to be deemed a manufacture of hair. This position cannot be maintained. Their article is no more a manufacture of hair than of cotton, and the tariff acts are provided with a rule of construction by which the classification of all articles shall be ascertained which are non-enumerated, and which furnishes the only guide in cases like this. If a duty were imposed simply upon all manufactures of hair, the plaintiffs' case would not be sufficiently plausible to require discussion. But, in the same paragraph in which duties are imposed on "all other manufactures of hair," a duty is imposed on crinoline cloth and hair-seating—articles which are not manufactures of hair, but of hair and cotton. Thus, both crinoline cloth and hair-seating are dealt with as manufactures of hair; and this

affords support to the argument, that by the term "*other manufactures of hair*," Congress did not mean manufactures of which hair is the exclusive component. This argument is well advanced, but it is not sufficient for the purposes of the plaintiffs' case. Where a general descriptive term is employed in a statute, in connection with words of particular description, the meaning of the general term is to be ascertained by a reference to the words of particular description. Applying that rule here, the general words, "*all other manufactures of hair*," will be construed to cover all such other manufactures of hair as are similar to crinoline cloth and hair-seating, although they may contain cotton or other components. They will not include, however, such manufactures as are not reasonably suggested by those specifically described. In other words, they will be construed to mean, such other manufactures as are similar to the particular articles which were the subject of legislative consideration. The only similarity between the plaintiffs' importation and crinoline cloth or hair-seating consists in the fact, that all of them are made of both cotton and hair. It follows, that the article imported by the plaintiffs is not an enumerated article and was properly classified under the cotton section.

The case of *Arthur v. Sussfield*, (96 U. S., 128,) cited for the plaintiffs, was one where the article was an enumerated one. There, spectacles made of steel and glass were in controversy. One provision of the tariff Acts imposed a duty on all manufactures of which steel was a component part, and another upon all manufactures of which glass was a component part. The article was thus not non-enumerated, but was enumerated twice, because, both steel and glass were component parts of it. But, the intention to impose the glass duty instead of the steel duty was found by applying the maxim, *noscitur a sociis*, it being imposed upon pebbles for spectacles and all manufactures of which glass was a component part.

Reference has been made, in the argument, to the provisions of the prior tariff Acts, as bearing upon the construc-

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Butterfield v. Arthur.

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tion of the Act in question. In regard to these Acts, it is sufficient to say, that they do not strengthen the position of the plaintiffs. By the Act of March 2d, 1861, § 21, (12 *U. S. Stat. at Large*, 190,) duty is imposed "on hair-cloth and hair-seatings and all other manufactures of hair," and, by the Act of July 14th, 1870, § 21, (16 *U. S. Stat. at Large*, 264,) to reduce duties, the duty is decreased "on hair-cloth, of the description known as hair-seating." Under this phraseology, hair-cloth is described as a manufacture of hair, and seems to have been distinguished from hair-seating, and described by a commercial designation; and, because of this, upon the trial, I was inclined to hold that hair-cloth should be included, in the present section, as a "manufacture of hair," and left it to the jury to find whether or not the plaintiffs' importation was an article commercially known as hair-cloth. This, I am satisfied, was an error, because, the section as it now stands, furnishes quite clear evidence of the legislative intent to reduce the duty upon those manufactures of hair which are *ejusdem generis* with crinoline cloth and hair-seating, and upon none other.

A verdict should have been directed, upon the trial, for the defendant. It was error to leave the case to the jury, and, for this reason, a new trial is granted.

• *John Hallock Drake*, for the plaintiffs.

*Stewart L. Woodford*, (*District Attorney*), for the defendant.

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Fischer v. Wilson.

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## VALENTINE FISCHER

vs.

HENRY WILSON, GUNTHER K. ACKERMAN AND JOHN BORKEL.  
IN EQUITY.

The letters patent, No. 74,068, granted to Valentine Fischer, February 4th, 1868, for an "improvement in machine for forming sheet metal mouldings," are valid.

The 4th claim of the patent, namely: "Arranging the female die, G, above the male die, E or F, for the purpose of keeping the female die clear, as set forth," claims the described arrangement of the two dies, so that, having such a lower male die as E or F is, the female die shall be above the male die, and thus be kept clear, resulting in keeping both dies clear, instead of having the female die below, in a position to be clogged and mar the work, even though the upper male die should clear itself.

Where a defendant in a suit in equity puts in proofs to sustain the allegations of his answer, and allows the plaintiff to put in proofs in rebuttal, and proofs in contradiction of the allegations of the answer, without entering any objection on the record that there was no replication to the answer, he is estopped from raising such objection at the hearing.

Sufficient *prima facie* evidence of the use by a defendant of a machine infringing a patent, held to have been given.

(Before BLATCHFORD, J., Southern District of New York, April 28th, 1879.)

BLATCHFORD, J. This suit is brought on letters patent No. 74,068, granted to the plaintiff, February 4th, 1868, for an "improvement in machine for forming sheet metal mouldings." The bill was originally filed against the defendant Wilson alone, on the 19th of May, 1869. He put in an answer and a replication was filed to that answer. Proofs on the part of the plaintiff were taken in February, 1871. Nothing further was done till November, 1873, when the plaintiff closed his opening proofs. The defendant took some proofs in November, 1873. At the April term, 1874, a decree was entered for the plaintiff, by default. On the 13th of May, 1874, a written stipulation, entitled on the original suit, was

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Fischer v. Wilson.

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signed by the solicitors of the respective parties, stipulating that said decree "shall be vacated and the taking of proofs herein be opened;" "that the testimony herein, and in this case as amended by the insertion of Gunther K. Ackerman and John Borkel as defendants, together with said Wilson, shall close by the first day of August, 1874, and that said cause shall be brought to hearing before either judge of this Court, and at any place, thereafter, as counsel for complainant shall elect;" "that the bill of complaint herein may be amended by making Gunther K. Ackerman and John Borkel, both of the city of New York, co-defendants with said Henry Wilson, against whom the bill was originally filed;" "that, if said cause, as amended by the insertion of above new defendants, shall not be heard before the October term of this Court, and if the defendants shall not answer ready at said term, a decree may be entered in said cause against the defendants herein, those made defendants by amendment, as well as against said Wilson, the original defendant, and that there will be no motion made by defendants to vacate the decree by default, but that an accounting and injunction may be obtained by complainant without opposition by defendants, the accounting against said Ackerman and Borkel dating from the time of the purchase by them of the business of said Wilson, in which the infringing machine or machines were used;" "that no advantage shall be taken, or exceptions made, from the fact that said Ackerman and Borkel were not joint infringers, and that the bill has been amended, making them defendants;" and "that, if at any time after due notice from the defendants of the taking of testimony, the complainant cannot attend for said testimony, or will not consent that defendants go on, then the time for closing proofs shall be extended as many days as the notice covered, or as the defendants may be delayed." An amended bill was thereupon filed, making Wilson, Ackerman and Borkel defendants, and containing all proper averments for a complete bill. It was filed in pursuance of a written consent, entitled in the original suit, and signed by the solicitor for the de-

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Fischer v. Wilson.

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fendant therein, consenting that it be filed in place of the original bill, without costs, and it was annexed to such consent. A joint answer by the three defendants, to the amended bill, was filed in May, 1875. It was signed by the same solicitor who was solicitor for the defendant in the original suit. No replication to the same was filed. The defendants took proofs in June and July, 1875, and in February, 1876. The plaintiff took rebutting proofs in April, July and October, 1876.

The specification states the invention to be "a new and improved machine for forming sheet metal mouldings." It says: "This invention relates to a new machine for pressing mouldings for cornices, &c., from galvanized or other sheet metal, and consists in so arranging the machine, that but two kinds of dies for all kinds of smooth mouldings that may have to be formed are needed, viz., rounded and square dies. Of the latter, but one set is required for making all sorts of angles, while, of the rounded dies, as many sets must be provided as there are different sized curves to be represented in the mouldings. The dies are easily removed and replaced. The male die is arranged stationary, while the female die is secured to a slide or other reciprocating device. The male or stationary die is underneath the female or movable die, for the purpose of preventing the latter from being clogged or made imperfect by dirt or other foreign matter. The standard of the male die is made concave on one side, to allow the forming of three sides of a square by the apparatus." It further states that the invention consists, also, in the construction and arrangement of the device for moving the upper die. This is not important in the present case. The specification further says: "D is a standard for the lower stationary die. It is, by means of screws or otherwise, firmly secured upon the bar B, and is made in the form of the letter C, that is, concave on one side, as shown in fig. 2. The lower die E, which is a strip as long as the distance between the uprights A, is fitted upon the upper edge of the standard D, so as to firmly remain thereon. This die is conical in cross-section, forming a right angle at the apex,

and may be formed on (not fastened upon) the standard D, as part of the same, as it need never be removed. When rounded dies, F, are used, they are laid upon this die E, (as in fig. 3,) they being recessed on their under side for the purpose of fitting the die E. The upper die, G, which is of the same length as the lower die, and which is provided with a concave under side that corresponds to the shape of the lower die, (as in figs. 2 and 3,) is provided, at its upper surface, with two or more projecting pins, *a a*, which are perforated, and which serve as a means for fastening the die to a pendent bar, H, of nearly the same length as the die." Mechanism is described, by which the bar H is moved down and up, and whereby the upper die is "pressed upon the lower die and raised from the same, as may be desired." The specification adds: "The most difficult mouldings can be formed by this machine, as is indicated by red lines in figs. 2 and 3, the standard D being provided with a concave side, to facilitate the forming of such difficult mouldings, as is seen in fig. 2. The dies can be made of steel or other suitable material, and of suitable thickness." There are seven claims. Only claims 2 and 4 are alleged, in this suit, to have been infringed. Those claims are in these words: "2. The standard D, when provided with one concave side, as shown. 4. Arranging the female die G, above the male die, E or F, for the purpose of keeping the female die clear, as set forth."

The plaintiff's expert, Mr. McIntire, in his testimony given February 7th, 1871, describes a machine for bending sheet metal to form metallic cornices, which was a working machine, and which he had seen in operation at the establishment of Ackerman & Borkel, in Worth street, New York. He says: "Q. 3. Will you look at the model, complainant's Exhibit B, and state what it represents? A. I have examined the model marked complainant's Exhibit B. It represents a machine adapted to bending sheet metal to form metallic cornices. Q. 4. Have you ever seen a machine in operation constructed like said model; and, if yea, when and where and by whom? A. I have seen a working machine in operation at the establishment of Messrs. Ackerman & Borkel, No.      Worth

street, New York city, which was constructed and operated similarly to said model, complainant's Exhibit B. Q. 5. Please look at complainant's Exhibit C, and state what it represents? A. It represents a true, full-sized model of a short section of a bar of solid metal, which I saw used in, and as part of, the working machine which I have before stated I saw in operation at No. Worth street." He then goes on to describe the construction and operation of the working machine he so saw in operation. A longitudinal round bar or rod of metal was secured in a  $\Lambda$  shaped longitudinal groove formed at the lower edge of a carriage which reciprocated up and down, and which groove had its apex uppermost. The bar of solid metal, before mentioned, had, in its upper face, a longitudinal concavity. It was secured, with such concavity uppermost, on a table, and the sheet of metal to be moulded was placed immediately over such concavity, and beneath the round rod above. The latter was then moved downward, and forced the sheet of metal into such concavity, the concavity acting as the lower die, and as a female die, and the round rod acting as the upper die, and as a male die. Thus half-rounds were formed in the sheet of metal. In the above operation, it is not alleged there was any infringement of either the 2d claim or the 4th claim of the Fischer patent. After the above operation was performed, the round rod was removed from the lower edge of the reciprocating carriage, and the bar with the concavity, which had before served as the female die, was mounted edgewise, and secured in the platform, so as to present uppermost an edge instead of a concavity, and to make such edge a male die, and the  $\Lambda$  shaped groove in the lower edge of the reciprocating carriage, from which the round rod had been removed, became the female die. The sheet of metal, with the half-rounds so formed in it, was placed over such male die, and the carriage descended, so that the  $\Lambda$  groove moulded the sheet over the male die, and made angular bends in it. In such position the concavity in the lower bar, being at the side, accommodated the half-round bends previously made in the sheet. When so used to make angular bends, the

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Fischer v. Wilson.

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machine embodied the inventions covered by the 2d claim and by the 4th claim of the plaintiff's patent, containing the same arrangement of the female die over the male die that is covered by the 4th claim, and the concave side of the male die being a substantial equivalent for the standard with one concave side, covered by the 2d claim. The foregoing testimony of Mr. McIntire was given before Ackerman and Borkel were made defendants. In November, 1873, it was admitted on the record, by the counsel for the defendant, (Wilson then being the only defendant,) "that the machine mentioned by the witness McIntire, in answer to question 4, had been used by the defendant since the date of the patent upon which this suit was brought, and before the commencement of this suit." After Ackerman and Borkel were made defendants, the plaintiff put in no direct testimony to show that they had ever used the infringing machine.

The defendants now contend, that there can be no decree against Ackerman and Borkel, because, (1) no replication has been filed to their answer; (2) because the use proved is a use by Wilson alone, and not a use by Ackerman and Borkel, or either of them. It is contended, that the evidence taken before Ackerman and Borkel were made defendants cannot be read against them, and that the patent is not, in fact, in evidence against them.

As to the replication, the putting in of proofs by the defendants to sustain the allegations of their joint answer, after such answer was filed, and their allowing the plaintiff to put in proofs in rebuttal, and proofs in contradiction of the allegations of such joint answer, without entering any objection on the record that there was no replication to such joint answer, estops the defendants from now raising such objection.

As to the other objection, the reference in the stipulation of May 13th, 1874, signed by the solicitor on behalf of Ackerman and Borkel as well as on behalf of Wilson, (and under which Ackerman and Borkel put in their answer,) to the fact that they had bought "the business of said Wilson in which

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Fischer v. Wilson.

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the infringing machine or machines were used," and that the accounting against them was to date from the time of such purchase, and that they were to be enjoined, and that they were not to object that they had not infringed jointly with Wilson, taken in connection with the fact, that, in the joint answer, which is sworn to by Borkel, the machine charged in the bill as infringing is spoken of as "the machine used by these defendants," is sufficient *prima facie* evidence of the use of the machine by Ackerman and Borkel.

The defendants claim to have shown that the machine used by Wilson, and sold by him to Ackerman and Borkel, embodied the 2d and 4th claims of the plaintiff's patent, before the plaintiff made the inventions. But, the whole evidence of the witness Conolly, taken together, shows that such machine did not embody either of those claims until after the plaintiff completed, and put into the shape of a model, the inventions covered by those claims.

The plaintiff's lower or male die, whether E, forming a right angle at the apex, or F, a rounded die on the upper surface, is of such a form that it cannot be "clogged or made imperfect by dirt or other foreign matter." This being so, it is apparent, that, if the female die is placed above the male die, so that the female die cannot be "clogged or made imperfect by dirt or other foreign matter," the resulting smooth sheet metal mouldings will not have their surface marred by the interposition of dirt or foreign matter between the dies. Mr. McIntire, the plaintiff's expert, testifies, that the state of the art, prior to the plaintiff's invention, was, that, so far as he knows, all machines had been made with the dies so arranged that opportunity was afforded for the collection of dirt, chips, &c., in or about the lower die; that the consequence was more or less injury to the dies, and imperfection in the work produced; that the plaintiff, in fact, arranged the female die, as shown and described, over a male die which had no concavities or surrounding hollows in which any "dirt or other foreign matter" could collect; and that, merely placing the female die over the male die would not effect the objects

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Fischer v. Wilson.

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of the invention, unless the male die were so made and arranged as to afford no chance for the collection of dirt that would destroy the perfection of the work. This testimony is not contradicted. In view of it, and of the fact that the 4th claim claims "arranging *the* female die, G, above *the* male die, E or F, for the purpose of keeping the female die clear, as set forth," and, as the object of the invention would not be attained by putting the female die above, and thus keeping it clear, if the male die were one so arranged as to retain dirt or foreign matter in or about it, the proper construction of the claim is, that it claims the described arrangement of the two dies, so that, having such a lower male die as E or F is, the female die shall be above the male die, and thus be kept clear, resulting in keeping both dies clear, instead of having the female die below in a position to be clogged and mar the work, even though the upper male die should clear itself. In this view, nothing is shown that affects the novelty of the 4th claim. In the J. S. Beach patent, though the female die is above, dirt can collect in the working parts of the lower die. The plaintiff's 4th claim is not anticipated by the Seely patent, or by either of the Lamplugh patents, or by the Worthen and Renwick patent, or by the Johnson patent, or by anything else put in evidence. Nor is the novelty of the plaintiff's 2d claim affected by any of the above patents, or by any other evidence.

There must be the usual decree for the plaintiff.

*Charles F. Blake*, for the plaintiff.

*Charles B. Stoughton*, for the defendants.

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Watts v. The Phoenix Mutual Life Insurance Company.

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JAMES R. WATTS

vs.

## THE PHOENIX MUTUAL LIFE INSURANCE COMPANY.

A policy issued by a mutual life insurance company insured, in consideration of ten annual premiums to be paid, the life of W., in the sum of \$1,000, to be paid to him at the age of 40, or to his mother and sister, equally, if he should die before arriving at that age. The policy provided, that, if, after the payment of two premiums, the policy should cease because of the non-payment of premiums, the company would, on the surrender to it of the policy, issue a new policy for the value acquired under the old one, subject to any notes given for premiums, without subjecting the assured to any subsequent charge, except annual interest, in advance, on all premium notes remaining unpaid. W. paid the premium for nine years, in cash. For the rest he gave four notes, still outstanding, on which he had paid the interest annually. He wishing to surrender the policy and take a new one for the value acquired under the old one, the company tendered to him a new policy, which he refused. Subsequently, he tendered to the company, for signature, a written policy, differing in form from the printed form used by the company, but the same, in legal effect, as the policy which he had refused. The company refused to sign the written policy, because it was not its regular printed form. W. had, before tendering the written policy, applied to the company, without success, for a printed form. W. then, before attaining the age of 40, sued the company, seeking to recover, as damages for not issuing the new policy, the premiums for the nine years: *Held*, that the defendant had no right to object to signing the written policy because it was not its printed blank, unless it tendered a policy made by using such blank.

*Held*, also, that the plaintiff could recover more than nominal damages only in an action in which his mother and sister were co-plaintiffs; that the contract was not rescinded; that proof of the amount paid in premiums was no proof of damage; and that the recovery could be only for nominal damages.

(Before BENEDICT, J., Eastern District of New York, April 30th, 1879.)

BENEDICT, J. This action was tried before the Court by consent. It is brought to recover damages for the breach of a contract of insurance upon the life of the plaintiff, James R. Watts.

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**Watts v. The Phoenix Mutual Life Insurance Company.**

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The defendant, by its policy, agreed, in consideration of \$103 20 paid by Catherine Ann and Mary Watts, (mother and sister,) and of the annual payment of a like amount until he shall have paid ten full years' premiums, to assure the plaintiff's life in the amount of \$1,000, and to pay that amount to him on the 28th day of February, 1883, when he shall have attained the age of 40 years, or, should he die previous to attaining that age, to Catherine Ann and Mary Watts, equally. The policy contained this further provision: "It being understood and agreed, that, if, after the receipt by this company of not less than two or more annual premiums, this policy should cease in consequence of the non-payment of premiums, then, upon a surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for the value acquired under the old one, subject to any notes that may have been received on account of premiums, \* \* \* without subjecting the assured to any subsequent charge, except the interest annually, in advance, on all premium notes remaining unpaid on this policy." The plaintiff paid the premiums, as agreed, for nine years, in cash. For the remaining part he gave four notes, still outstanding, upon which he has paid the interest annually. In May, 1877, the plaintiff determined to surrender the policy and take a new policy for the value acquired under the old one, in accordance with the provisions above quoted. A dispute arose as to whether the defendant had the right to insert in such new policy a provision that the policy should be forfeited by the failure to pay, when due, the annual interest on the outstanding notes that had been given for part of the premiums. The defendant tendered a policy containing such a clause, which the plaintiff at first refused to accept. Subsequently, he concluded to waive his objection, and tendered to the defendant, for signature, a policy drawn out in writing, which, while differing somewhat in form from the printed form used by the defendant, was the same, in legal effect, as the policy first tendered by the defendant and

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Watts v. The Phoenix Mutual Life Insurance Company.

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rejected by the plaintiff. The defendant refused to sign the written policy, in the following language: "As we have a regular printed form, upon which we issue all paid ups, it would be neither fair nor consistent to make an exception in your case." It appeared in evidence, that, prior to tendering the written policy, the plaintiff had applied to the defendant, without success, for one of their printed forms, stating that he desired it, to enable him to tender a policy for their signature. Upon the refusal to sign the written policy, the plaintiff brought this suit, wherein he seeks to recover, as damages for a breach of the agreement to issue a new policy for the value acquired under the old one, the full amount of the premiums for the nine years, including that portion paid in cash and the part for which his notes are still outstanding. The question discussed by counsel, whether the policy tendered in the first instance by the defendant was a compliance with the contract contained in the original policy, does not require to be decided on this occasion, for the reason, that the refusal of the defendants to execute the written policy subsequently tendered by the plaintiff for their signature, was, in legal effect, a refusal to deliver any new policy at all. It was not unreasonable for the defendant to prefer to sign a policy according to its printed form, but, when the plaintiff presented for execution a policy to which the defendant could make no other objection than that it was not one of its regular printed forms filled up, it was incumbent on the defendant, if it preferred to use its own blank, to fill up such a blank and give it to the plaintiff, in lieu of the written one he had sent to it for signature; and this the more because the plaintiff had applied to it for a printed blank and had been refused. The defendant contented itself with refusing to execute the written policy and returned it to the plaintiff unexecuted. This action was, in legal effect, a refusal to issue any new policy, and constituted a breach of the provision above quoted from the old policy.

But, the objection is taken to any recovery herein, because the action is brought in the name of the plaintiff, with-

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Watts v. The Phoenix Mutual Life Insurance Company.

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out joining the mother and sister, to whom, in case of death, the amount insured was to be paid. This objection appears to be fatal. It is a general rule, that, on a life policy in the ordinary form, where the money to become due upon the death of the insured is payable to a certain person named as beneficiary, the policy and money payable upon the death belongs, from the time of the delivery of the policy, to the person designated to receive the money, and he alone can maintain an action upon the policy. (*Martin v. The Franklin Ins. Co.*, 9 *Vroom*, 140.) The present policy differs from the ordinary policy only in this—that, in case the insured shall live to attain the age of 40 years, the money is then to be paid to him. But, the mother and sister are none the less beneficiaries under the policy; and the agreement in the policy, to issue a new policy in place of the old one, wherein the mother and sister were to be beneficiaries as in the old one, is an agreement with them as well as with the person whose life is insured. It follows, that, in any action to recover damages for the breach of that agreement, the mother and sister should be joined as parties plaintiff. If this be otherwise, still the plaintiff can only recover nominal damages.

The plaintiff claims to recover back the premiums paid, upon the theory that the contract is rescinded. But, this contract has been in force, and acted upon by the parties, for nine years, during which time the life of the plaintiff has been insured and the defendant has been subject to the risk. It is impossible, therefore, to put the parties back in their original position, and there can be no rescission of the contract. The case made by the plaintiff is that of a breach by the defendant of a contract partly executed; and it was not enough to prove the breach charged. There must, also, be proof of the damage sustained. The case is wholly bare of such proof. There is evidence of the amount paid in premiums, but this evidence furnishes no basis from which to compute the actual loss resulting from the failure to obtain the new policy provided for in the contract sued on. In the

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Robbins v. The Firemen's Fund Insurance Company of San Francisco.

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absence of any evidence from which the damage can be arrived at, the recovery must be limited to nominal damages.

*E. & W. G. Cooke*, for the plaintiff.

*James S. Stearns*, for the defendant.

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HENRY A. ROBBINS AND DANIEL F. APPLETON

vs.

THE FIREMEN'S FUND INSURANCE COMPANY OF SAN FRANCISCO.

Under §§ 650, 652 and 693 of the Revised Statutes of the United States, no civil suit, where there is a certificate of division of opinion, can be taken to the Supreme Court except upon final judgment, and by writ of error or appeal; and, under § 691, as amended by § 3 of the Act of February 16th, 1875, (18 *U. S. Stat. at Large*, 316,) no final judgment or decree can be re-examined unless the matter in dispute exceeds \$5,000.

(Before SHIPMAN, J., Southern District of New York, May 1st, 1879.)

SHIPMAN, J. In my opinion, under the existing statutes in regard to certificates of division in civil cases, which are contained in sections 650, 652 and 693 of the Revised Statutes, no civil suit, where there is a certificate of division, can be taken to the Supreme Court, except upon final judgment and by writ of error or appeal. In such case, those statutory provisions also apply, which provide that the final judgments or decrees of the Circuit Courts shall not be re-examined in the Supreme Court, unless the matter in dispute shall exceed \$5,000. (*Section 691 of the Revised Statutes, as amended by the 3d section of the Act of February 16th, 1875, 18 U. S. Stat. at Large, 316.*)

It follows, that a certificate of division would not enable the judgment in this case to be reviewed by the Supreme

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Stough v. Hatch.

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Court; and the motion for a certificate of division of opinion is denied.

*Leon Abbett*, for the plaintiff.

*Joshua M. Van Cott* and *John Winslow*, for the defendant.

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CHARLES J. STOUGH vs. ASA L. HATCH.

A cause was noticed for trial by the plaintiff, at a term of the State Court, and a note of issue for that term was filed by the plaintiff. Both parties consented that the cause go off for the term, and it was not tried. After the term expired the defendant removed the cause into this Court, under the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470 :) *Held*, that the removal was not in time, not having been made before or at "the term at which said cause could be first tried."

(Before BENEDICT, J., Eastern District of New York, May 1st, 1879.)

BENEDICT, J. This cause was upon the calendar of causes for trial, at the circuit of the Supreme Court of the State, at the January Term, 1879. It was noticed for trial at that term, by the plaintiff, and a note of issue for that term was filed by the plaintiff. It was not tried at that term, both sides having consented that the cause go off for the term. After the expiration of that term, application was made to the State Court to remove the cause to this Court, which application was granted. The plaintiff now moves this Court to remand the cause to the State Court, on the ground that the application to remove was made too late. This motion must be granted. The January Term, 1879, was "the term at which said cause could be first tried," within the meaning of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) for, the cause was at issue, duly noticed for trial, and subject to be tried on its merits at that term. That the parties were not prepared for

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Gordon v. Anthony.

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a trial at that term, and consented that the cause go off the calendar for that term, are facts that do not affect the question here.

*Theodore Hinsdale*, for the plaintiff.

*Turner, Lee & McClure*, for the defendant.

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EBENEZER GORDON

vs.

EDWARD ANTHONY AND OTHERS. IN EQUITY.

The letters patent granted to Ebenezer Gordon, October 19th, 1858, for "a photographic shield," are valid.

Although a suit in equity for the infringement of a patent is brought after the patent has expired, and no injunction can be granted, and the bill is not a bill of discovery, the Court has jurisdiction to award an account of profits, and can take cognizance of the suit.

A bill without interrogatories, under the amendment to Rule 40 in Equity, made at the December Term, 1850, and which prays only for a disclosure of gains and profits from infringement, is not a bill of discovery.

The case of *Stevens v. Gladding*, (17 How., 455,) examined and explained.

An assignment of an interest in a patent, made by a receiver, appointed by a State Court, of the property of the owner of the patent, conveys no title to the assignee, because the assignment is not a written instrument, signed by the owner of the patent.

(Before BLATCHFORD, J., Southern District of New York, May 3d, 1879.)

BLATCHFORD, J. This is a bill in equity founded on letters patent granted to the plaintiff, October 19th, 1858, for 14 years from that day, for a "photographic shield." The bill was filed in 1873, after the patent had expired. The patent had, in fact, been extended, but the bill does not allege any extension, as the right for the extended term had been

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Gordon v. Anthony.

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assigned by the plaintiff. The bill alleges the unlawful manufacture and sale by the defendants, ever since January 1st, 1864, of photographic apparatus containing the patented improvement. It alleges that the defendants had derived and received therefrom gains and profits to about the sum of \$20,000, and prays that the defendants be required "to make a disclosure of all such gains and profits." It also prays that the defendants be compelled to account for and pay over to the plaintiff all such gains and profits, and, in addition, to pay damages, and for an injunction to restrain the infringement of the patent by the defendants. There are no interrogatories to the bill.

The specification of the patent sets forth that the invention is an "improvement in frames or shields for photographic cameras." Drawings are annexed. It says: "Fig. 1 is a view of the frame or shield with the back open, to show my improvements; Fig. 2 is a view of one corner; and Fig. 3 is a section through the frame, representing one of my improved corner pieces in place. Similar marks of reference denote the same parts. In taking landscape views, groups and similar pictures, the plate is used in a horizontal position, while, in taking likenesses of one person, and similar views, the longest side of the plate receiving the same stands vertical in the camera. To accommodate these two positions in photographic and similar pictures, separate frames have been constructed to receive and shield the plate while being conveyed to and from the camera, or else the camera has to be turned upon its side, greatly to the inconvenience of the operator, and the loss of time in adapting the plate and camera to take the particular picture. My said invention obviates all the foregoing inconveniences, and consists in what may be termed a 'turn shield,' the same being a frame *a*, adapted to the camera, with the back *b*, and slide *c*, in the usual manner. The interior of this frame forms a square opening, of a little more than the longest length of the plate to be used therein; *d*, *d*, are my improved corners, that are formed of suitable material, and each corner piece has two recesses for

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Gordon v. Anthony.

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receiving the glass or other plate, the recesses 1, 1, sustaining the same when the longest sides of the plate are vertical, and the recesses 2, 2, receiving the plate when in position for a landscape or similar picture. Between the recesses 1 and 2, in each corner, there is, therefore, a square block or support, 3, measuring, along its side, one-half the difference between the vertical and horizontal sides of the glass or other plate, which, with the present sizes of plates, will be  $\frac{1}{2}$  an inch, one inch, or one and a half inches, for the square of the said block, 3. The frames carrying smaller sizes of plates, adapted to the main frame or shield in the usual manner, can be placed into the corners aforesaid, in either a vertical or horizontal position, and the plate will occupy a corresponding position within said frames." The claim is: "The corners, *d, d*, formed with two recesses, and applied at the angles of a square frame, to receive the photographic plate, or its equivalent, in a horizontal or vertical position, as set forth."

The record contains the following admission: "Counsel for defendants admits that the defendants, before the filing of the bill and since the date of the letters patent herein, have made and sold corner pieces of which Exhibit A is a sample; and, also, that they have sold, within the said period of time, corner pieces of which Exhibit B is a sample; and that such corners were used and applied at the angles of square frames, used to receive and hold photographic plates in photographic cameras, which frames containing said corners were also made and sold by the defendants, as aforesaid; and that the frame of which Exhibit C is a sample is a frame of the kind made and sold by them containing corner pieces like said Exhibits A and B." It is not claimed that what was so done by the defendants was not a practicing of the invention claimed in the patent, although no witness testifies that it was. There is no admission, however, that what was so done by the defendants was done before the 19th of October, 1872, when the patent expired. It may have been done after that date and yet have been done "before the filing of the bill and since the date of the patent." Both parties, how-

ever, have proceeded on the view that it was done before the patent expired.

The defendants attack the plaintiff's patent for want of novelty, and several prior inventions are adduced. One is a patent granted to M. J. Drummond, assignee of William Lewis and William H. Lewis, the inventors, October 7th, 1856, for a "plate holder for photographic cameras." The specification of that patent points out two matters as requiring remedy in taking photographs—one, that, immediately after the plate is taken out of the nitrate of silver bath, it is placed in the frame for the camera, and the liquid drops off into the frame, and, in handling, runs on to clothes, or carpet, or floor, and stains; the other, that the moist collodion and chemical substances on the corners of the plate adhere to the edges of the frame and rebate and prevent the plate coming properly into focus, while such dirt and chemical matter also stains the chemicals on the plate, being often absorbed so as to become a blemish on the background. The specification states, that the nature of the invention consists in "the use of glass or similar vitrified corners in the frame that receives the corner of the glass or other plate, the said corners each being formed of one solid piece of vitrified material, so that there is no chance for the chemicals to come in contact with any material that will cause discoloration." It further says: "We also introduce a receptacle into the bottom of the frame or holder, that catches any drippings from the plate and retains the same, even if the holder is laid down on its side." The receptacle is not material. The glass corners are thus described: "*h, h* are solid corners of glass or other vitrified material, secured into the angles of the frame *f*, and, as these corners may be attached by different means, we have shown at 5, 5, small screws passing through holes in said corner pieces, into diagonal pieces, 6, 6, attached to the frame, and, over the head of said screws suitable cement is placed, but the same must be below the surface of the glass corners. At 8, 8, we have shown a flanch formed on the back of the glass corner, receiving screws that

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Gordon v. Anthony.

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pass into the frame *f*. \* \* \* We are aware that pieces of glass have been inserted in the corners of plate frames, to take the face of the glass or other plate, but said pieces of glass are very apt to become loose. The cementing made use of comes in contact with the corners and edges of the glass or other plate, and discolours the same, and there is no chance for keeping the corners clean. In view of the foregoing, the nature and utility of our invention will be apparent, for, the solid glass or vitrified corner can always be kept clean, and there is nothing that comes in contact with either the surface or the edges of the glass or other plate, but the said vitrified corners. At 9, 9, small projections are shown on these vitrified corners, which, being slightly elevated, always take the plate, and are wiped off with greater ease, so as to ensure a proper focal position for the plate." The patent claims: "Forming the glass or vitrified corners, *h*, with a flanch or rim, in one solid piece, the said flanch or rim taking the edges of the photographic glass or other plate, substantially as and for the purposes specified, and irrespective of the manner in which the said vitrified corners are attached to the frame." The testimony of William Lewis, one of said inventors, shows that he made and sold as early as 1856 square plate holders with the glass corners of the Drummond patent. Mr. Hicks, the defendants' expert, states that he considers the substance of the invention set forth in the plaintiff's patent to be "a photographic frame, having corners in the corners of the photographic frame, provided with recesses, and the whole, when complete, enabling the operator to reverse from a vertical to a horizontal position an oblong photographic plate, so that it shall be held, whether reversed or vertical, in three directions—endwise, both up and down; facewise, which prevents it from passing through the frame; and sidewise, which prevents it from moving laterally." He further says: "I find in the invention of Lewis, referring to his testimony, and taking it in connection with his patent, substantially a photographic frame provided with glass corners, the frame being made

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Gordon v. Anthony.

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square, so that the plate may be reversed from a vertical to a horizontal position, and provided with elevations on the face of the glass corners, so located in reference to the frame, that a photographic plate could be placed in said frame and held vertically between said elevations, which would prevent the plate from moving sidewise, the face of the plate preventing it from pushing through, or, in other words, supporting the face of the plate, and the flanges of the corners preventing endwise movement of the plate. When the plate is turned in a horizontal position, the same stops operate upon the photographic plate in the same manner as before described as to the vertical position of the plate. I, therefore, find in the invention of Lewis, the substance of the invention set forth in the Gordon patent. The difference which I wish to notice between these two inventions is, that, in the Lewis invention referred to, as set forth in his testimony, a square plate may be used, resting upon the glass studs to which I have referred before in this answer, and which are marked 9 in the Lewis patent, and probably were intended to act against the face of a square plate, to locate its focal distance, instead of the face of the corner, which would thus act, if the plate were placed between the studs." Professor Charles A. Seeley, the plaintiff's expert, testifies as follows: "The Lewis invention consists of solid glass corners for a camera shield. Previous to the Lewis invention the corners were usually made of pieces of glass cemented together. For such corners Lewis substitutes single pieces of solid glass. The Lewis corners were not intended to perform any new office. They were of the ordinary form, and the shield was used in the ordinary way. Gordon's invention consists in corners of a peculiar form, and performing a new purpose. The novelty of Lewis' corners is the material of which they are made. Gordon's corners may be made of a variety of substances, but it is required that they shall be of a peculiar form. Lewis' corners are suitable for the photographic plate frame as ordinarily used. Gordon's corners require the frame to be made especially for them. The outline of the opening

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Gordon v. Anthony.

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of the ordinary plate frame is that of a photographic plate, viz., oblong, whereas Gordon's corners are only useful in a frame with a square opening. The purpose of Gordon's invention is to permit the changing of the plate from a vertical to a horizontal presentation, or *vice versa*, without a special adjustment of the plate holder. Lewis' invention has no such purpose in view, and cannot be made to effect it. I find no points of agreement between the two inventions, in their nature, or construction, or purpose." On cross-examination, being shown a fac-simile of the model of the patent for the Lewis invention, and being asked whether he does not find in the corners "studs or projections which would enable the operator to change a plate from a horizontal to a perpendicular position, assuming that such studs were on all four corners, he replies: "I do not." "21 *Cross-Q.* Why not? A. The studs do not project enough to make a sufficiently firm support, and they are not in the position which the change of plate requires. The studs in this exhibit were not intended for any such purpose, cannot be used for it, and do not suggest it. To make studs suitable for such a purpose, the frame must have a square opening, whereas, in this case, it is oblong, and the distances between the studs must be very accurately adjusted. When these conditions are complied with, the device becomes substantially Gordon's. 22 *Cross-Q.* If this opening were square, and the studs more projecting, would it not then be Gordon's? A. Not necessarily. The studs of the exhibit are intended to be supports of the plate on which it is laid. If the conditions of Gordon's device were complied with, the adjacent studs would be placed at a distance from each other precisely the width of the plate, and the plate, when used in the frame, would not rest on the tops of the studs, as is evidently intended in the Exhibit No. 4. 23 *Cross-Q.* Assuming the opening to be square, and lines to be drawn from the inner side of the bottom stud to the inner side of the top stud, would not these lines, together with the top and bottom of the frame, form an oblong parallelogram? A. Yes. 24 *Cross-Q.* And, if similar lines were drawn across the open-

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Gordon v. Anthony.

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ing from stud to stud, would not these lines, with the side of the frame, constitute an oblong parallelogram? *A.* They would. 25 *Cross-Q.* And, if the opening were square, would not these two oblong parallelograms be equal? *A.* They would, provided the studs were symmetrically placed, and placed in the diagonals of the square. But Lewis' patent does not require any such accurate placing of the studs. Lewis' invention requires only that they shall be so placed that the plate may rest on them." On his re-direct examination, he testified thus: "26 *Re-D. Q.* In your answer to the 23d *Cross-Q.*, have you not assumed, also, that the distances between the sides of the studs upon each side of the frame were equal? *A.* Yes; I assumed that. 27 *Re-D. Q.* Please state the differences between the Gordon and the Lewis invention, so far as the arrangement or adjustment of the studs or projections in the corners is concerned? *A.* The office of the stud, in the Lewis invention, is to form a support for the frame. The plate rests upon the studs, and keeps the face away from contact with any other part of the frame. It is required that the studs shall have precisely the same height, but the amount of this height is not very material. It would ordinarily be made some fraction of the thickness of the plate. The precise location of these studs in reference to each other is, also, not material. It is only required that they shall be placed within the boundary of the plate. The figure which would be formed by the lines joining the adjacent ones might be a parallelogram, or a figure in which no two sides or angles were equal. The opening of the plate frame of the Lewis invention is of the form of the plate, and, of course, is generally an oblong parallelogram. Now, to prepare studs in accordance with the Gordon invention, the frame opening is, of necessity, square, and the side of this square is the length of the plate. The studs must be so placed that the edges of adjacent studs shall be distant from each other the width of the plate. The height of the stud should be somewhat more than the thickness of the plate, but it is not at all necessary. The studs should have the same height. In both inventions,

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Gordon v. Anthony.

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the plate is kept from sliding in the focusing frame by the edges of the corners. In use, in the Lewis invention, the plate rests on the tops of the studs, while, in Gordon's, the plate rests on the bottoms of the corners. In the Lewis invention, it is not necessary that the bottom surfaces of the corners shall be in the same plane, whereas, in Gordon's, it is absolutely essential. In the Lewis invention, the plate rests on the tops of the studs, while, in the Gordon, the plate rests against the edges of the studs. The Lewis studs prevent a movement in a direction perpendicular to the plane of the plate, while, in the Gordon, they prevent movement in the plane of the plate. I do not think it possible that the Lewis invention could be constructed by any chance so as to comply with the conditions of Gordon's invention, nor do I think it likely in any way to suggest Gordon's invention to any person unacquainted with the latter." The contention on the part of the defendants is, that, while there is nothing in the Lewis patent which suggests the use of the studs for the purpose of Gordon's invention, yet a plate could be supported by those studs in such a manner that oblong pictures could be taken, either vertically or horizontally; that, if so, it makes no difference whether Lewis thought of doing it or not; and that, if the Lewis structure is capable of the use to which the plaintiff's structure is put, it is the same thing. The complete answer to the Lewis structure is, that there is nothing in the patent which requires that the studs should be located, with reference to each other, in such manner that the figure formed by the lines joining the adjacent studs shall be a parallelogram, which is an absolute necessity in the Gordon invention, as described. The matter is clearly explained by Professor Seeley, and there is nothing in the opposing evidence that meets his view.

The patent to John Stock, of December 1st, 1857, for a "photographic plate holder," is introduced by the defendants. But no witness testifies that the plaintiff's invention is found in it and the contrary is shown by Professor Seeley.

The burden of proof is on the defendants to establish, by

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Gordon v. Anthony.

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satisfactory evidence, the prior existence of the corners in Stock No. 1 and Stock No. 2. They have failed to do so, in my judgment. The unreliable nature of John Stock's testimony, the denial of his sales of the corners by the persons to whom he says they were sold, the unconvincing character of the testimony of Boch, Loehr and Jacob Stock, on the whole evidence, and the fact that, after the alleged making by John Stock of Stock No. 1 and Stock No. 2 he took out his patent of December, 1857, and described nothing of the kind, leads to the conclusion that this branch of the defence is not established. The nature of the invention set forth in that patent was making a plate holder fitted with sliding pieces, capable of being moved in or out to accommodate any sized glass or plate, said pieces being provided with suitable recesses and flanches to receive and support the glass or plate.

The existence of the exhibit Anthony No. 1 in the United States is not carried back to a date earlier than August 1st, 1858. The testimony is satisfactory to show that Gordon made his invention before that date.

It is urged for the defendants, that, as the patent had expired when this suit was brought, and no injunction could then be granted in it, and the bill is not a bill of discovery, the Court has no jurisdiction to award an account, and, therefore, cannot take cognizance of the suit, as a suit in equity. Perhaps the bill is not to be regarded as a bill to obtain a discovery by answer to the bill, because the defendants are not, under the Rule promulgated at the December term, 1850, amending Rule 40 in Equity, specially and particularly interrogated upon any statement in the bill. The bill states that the defendants' gains and profits from the manufacture and sale of the invention, in infringement of the plaintiff's rights, have been about \$20,000, and prays "that the defendants may be required to make a disclosure of all such gains and profits." It does not allege that the plaintiff cannot ascertain, without such disclosure, what such gains and profits are. On the other hand, no disclosure of gains and profits is necessary to establish the plaintiff's right to a decree for an

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Gordon v. Anthony.

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accounting, such as is usually given on an adjudication in favor of the plaintiff on a final hearing, on pleadings and proofs, in a suit in equity on a patent. Such disclosure is an incident of the accounting, and, in a decree for an accounting, a provision is inserted that the defendants attend before the master and produce their books and papers and submit to an examination respecting their gains and profits. Such examination of an accounting party is provided for by Rule 79 in Equity. The disclosure or discovery prayed for in the present bill is such a disclosure on an accounting. No discovery is prayed to establish the plaintiff's right of action to a decree for an accounting. That is established otherwise. Therefore, in no proper sense is the bill a bill of discovery or a bill praying a discovery.

In *Nevins v. Johnson*, (3 *Blatchf. C. C. R.*, 80,) in this Court, in 1853, before Mr. Justice Nelson and Judge Betts, the bill was filed after the patent had expired. It charged that the defendants had infringed, and "had realized great profits therefrom, and prayed a discovery of the particulars and extent of the use of the improvement, and that an account might be taken of the profits." It was, in substance, like the present bill. It was demurred to, for want of equity, on the ground assigned, that there was a complete and adequate remedy at law in the case, and that a Court of equity had no jurisdiction of it, because the term of the patent had expired before the suit was commenced and no injunction could be granted. But the Court held, that, under the statute then existing, (*Act of July 4th, 1836, 5 U. S. Stat. at Large, 124, § 17,*) jurisdiction in equity was conferred upon the Court, irrespective of the right of the patentee to an injunction. The present bill was filed in 1873, when § 55 of the Act of July 8th, 1870, (16 *U. S. Stat. at Large, 206,*) was in force, the language of which, in respect to the subject in hand, was, in substance, the same as that of § 17 of the Act of 1836, and the provisions of which are now found in sections 629, 711 and 4,921 of the Revised Statutes. The cases of *Sickels v. The Gloucester Mfg. Co.*, (1 *Fisher's*

*Patent Cases*, 222,) *Imlay v. The Norwich and Worcester R. R. Co.*, (4 *Blatchf. C. C. R.*, 227,) *Smith v. Baker's Admrs.*, (5 *Off. Gaz. of Pat. Office*, 496,) *Jordan v. Dobson*, (2 *Abb. U. S. Rep.*, 398, 416,) and *Howes v. Nute*, (4 *Fisher's Patent Cases*, 253,) recognize the rule as laid down in *Nevins v. Johnson*. In some of those cases the bill was filed before the patent expired and the decree was made after it expired.

In *Draper v. Hudson*, (1 *Holmes*, 208,) before Judge Shepley, in 1873, the bill was for an injunction and an account, on a patent. The defendant died pending the suit and his executor was made defendant. No discovery was prayed against the executor, and there was no proof of infringement by him. The case is a difficult one to understand. There were two claims in the patent, which was a reissued patent. The Court held that no infringement of the first claim, after the reissue, was shown, and that the second claim was void. A dismissal of the bill would seem, therefore, to have been necessary. Yet the Court went on to say, that, as there could be no injunction against the original defendant, who was dead, and none against the executor, because he had not infringed, the right to an account failed, because the right to an injunction and a discovery failed. English cases were cited and the Court added: "Although the jurisdiction of the Circuit Court in equity, in patent causes, rests upon statute provisions, it is to be exercised according to the course and principles of Courts of equity; and, the Supreme Court of the United States having decided, in *Stevens v. Gladding*, (17 *How.*, 455,) that 'the right to an account of profits is incident to a right to an injunction, in copy- and patent-right cases,' it would seem to follow, that, in a case like the present, where the title to equitable relief fails, the general rule of equity applies, that the incidental relief fails also." The bill was dismissed, without costs. The views of Judge Shepley appear to have been based on what he understood to have been decided in *Stevens v. Gladding*. That was a bill in equity founded on the infringement of a copyright. The Supreme Court held that there had been an infringement.

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Gordon v. Anthony.

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The bill prayed for an injunction and for general relief, but did not pray for an account, nor was an account stated in the answer. The question raised was, whether there ought to be a decree for an account. Of course, the plaintiff was entitled to a decree for an injunction. The point considered was, whether the plaintiff could have a decree for an account, when he had not prayed for it. The Court held that, as he was entitled to an injunction, he could have an account of profits, as an incident, and, also, that, as the bill stated a proper case for an account, one could be ordered under the prayer for general relief. The case does not decide, nor does it follow from it, that where, as here, the plaintiff states a case for an account, and prays for an account, and the defences are overruled, he cannot have an account, even though not entitled to an injunction. The weight of authority in this country is in favor of the right to an accounting, in a case like the present.

The record shows that the defendants put in evidence the record of certain proceedings in a suit brought by them in the Supreme Court of New York, against the plaintiff. Such evidence was put in in November, 1874. No objection was taken to it at the time, as not put in in season, or as not set up in the answer, or for any other cause. The record states that it was put in evidence, and that the seven papers constituting such proceedings were marked as exhibits for the defendants. On the 30th of June, 1875, and not before, the record states that the "complainant's counsel gives notice that he will move, before the hearing, to strike from the record" the said seven exhibits. The record states no reason as a ground for the notice or for the motion. At the hearing such motion was made, on the ground that no defence based on such proceedings is set up in the answer.

The proceedings show that the defendants brought a suit against the plaintiff, in the State Court, in 1864, to recover a debt. Judgment was had in May, 1866. On the 12th of October, 1866, in proceedings supplementary to execution on said judgment, one Beamish was appointed by said Court re-

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Gordon v. Anthony.

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ceiver "of all and singular the debts, property, equitable interests, rights and things in action of Ebenezer Gordon," the plaintiff, and he was ordered to execute and deliver an assignment of the same to said receiver. It does not appear that any such assignment was ever executed. On the 4th of August, 1874, the receiver presented a petition to the State Court, alleging, that, by virtue of his appointment and of his having given the requisite bond, he "became vested with all the estate, property and interests of the said Ebenezer Gordon, and, among others, the invention, patent, letters patent and patent-rights;" that Gordon, on the 12th of October, 1866, owned the said patent of October 19th, 1858, and the invention, patent and patent-right for which it was issued; that it was for the interest of the trust, "that all the right, title and interest of the said Ebenezer Gordon in and to the said invention, patent, letters patent and patent-rights," at the time of the appointment of said receiver, and all the right and title and interest of said Gordon therein at any time since such appointment, and all the said Gordon's "right, title and interest in and to all and any claims under the said invention, patent, letters patent and patentright," should be sold at auction to the highest bidder. It prayed for an order authorizing such sale. On the same day, an order was made by said Court, authorizing the sale at public auction by said receiver, for cash, on a specified notice, of everything which the receiver had so petitioned for leave to sell, and ordering that, on such sale being made, the receiver execute to the purchaser an assignment to vest the said property and interest in said purchaser. The record shows that the specified notice was given, and that the receiver sold at public auction, for \$200, to the defendants in this suit, who were the highest bidders, the property and interests mentioned in said order of sale; that he reported such sale to said Court; that said Court made an order, on the 21st of August, 1874, that the report be confirmed and that he execute to the purchasers an assignment to vest the property and interest so sold in them; that on the same day he executed and delivered to said purchasers

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Gordon v. Anthony.

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an assignment of said property and interests, which assignment specifies, as among the assigned property, "all the said Ebenezer Gordon's right, title and interest in and to all and any claims under the said invention, patent, letters patent and patent-right;" that he reported to the Court, on the same day, that he had done so, and had received from the purchasers the \$200 purchase-money, and how he had disposed of part of it; that the Court, on the next day, made an order confirming said report as to said assignment; that, on the latter day, the receiver reported to the Court how he had disposed of the rest of the purchase-money; and that the Court, on that day, confirmed said report.

The defendants contend, that, by virtue of said proceedings and said assignment, any right which the plaintiff had to recover against them for an infringement of the patent sued on has become vested in the defendants. Under sections 11, 14 and 17 of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 121, 123, 124,) it was always held, that no one could bring a suit, either at law or in equity, for the infringement of a patent, in his own name alone, unless he were the patentee, or such an assignee or grantee as is mentioned in the 11th and 14th sections of that Act. The provision in section 36 of the Act of July 8th, 1870, (16 *U. S. Stat. at Large*, 203,) in regard to the assignments of patents and of interests therein, now embodied in § 4,898 of the Revised Statutes, is not different from that found in section 11 of the Act of 1836. The provisions in sections 55 and 59 of the Act of 1870, in regard to suits in equity and at law for the infringement of a patent, now embodied in sections 629, 711, 4,919 and 4,921 of the Revised Statutes, are not different from those found in sections 14 and 17 of the Act of 1836. These provisions were considered by this Court in the case of *Nelson v. McMann*, (*ante*, p. 139.) Under them no person can bring a suit for profits or damages for infringement, who is not the patentee or such an assignee or grantee as the statute points out. A claim to recover profits or damages for past infringement cannot be severed from the title by assignment or grant, so as to

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Gordon v. Anthony.

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give a right of action for such claim, in disregard of the statute. The profits or damages for infringement cannot be sued for except on the basis of title as patentee, or as such assignee or grantee, to the whole or a part of the patent, and not on the basis merely of the assignment of a right to a claim for profits and damages, severed from such title. Therefore, if, in the present case, no such assignment or grant has been made to the defendants as the statute contemplates, they could not bring suit, in their own names, under the assignment made to them, to recover any claims, profits or damages for infringement, which belonged to Gordon. nor can they use the assignment as a defence against any such claims existing against themselves in favor of Gordon. In this case there has been no assignment executed by Gordon. The right claimed by the defendants rests, therefore, wholly on a transfer by operation of law. In *Stephens v. Cady*, (14 *Howard*, 528,) it was strongly intimated by the Supreme Court, that an assignment of a copyright by operation of law, unaccompanied by an assignment made by the owner, vests no title. In *Stevens v. Gladding*, (17 *Howard*, 447,) the same Court suggest that there would be great difficulty in assenting to the proposition that patent-rights and copyrights are subject to sale under the process of State Courts. In *Ashcroft v. Walworth*, (1 *Holmes*, 152,) it was held, that the title of an insolvent debtor to, or his interest in, a patent, does not pass to his assignee in insolvency, by an assignment of his property made by a Judge under the insolvency law of Massachusetts. This decision was made on the ground that the assignee in insolvency acquired no title, because the conveyance was not such an one as was contemplated by section 11 of the Act of 1836, namely, a written instrument signed by the owner of the patent and duly recorded. This seems to be a correct view, and it follows that the defendants acquired no right to anything which they can set up as a defence to the plaintiff's claim.

It is held, (*Moore v. Marsh*, 7 *Wallace*, 522,) that the assignment of a patent does not carry with it a transfer of the

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The Atlantic Giant Powder Company v. Rand.

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right to damages for an infringement committed before such assignment. It is not at all clear that the transfer of the "claims" which the assignment in the present case transfers, can be construed to cover claims for past infringements. (*Dibble v. Augur*, 7 *Blatchf. C. C. R.*, 86.)

If the defence under the receivership were held to be available in respect to the whole or any part of the claim of the plaintiff, the defendants would, probably, on the facts in regard to the putting in evidence of the proceedings in the State Court, be held to be entitled now to file a supplemental answer setting up such proceedings; but that question does not now arise.

There must be a decree for the plaintiff, for an account of profits and damages.

*Starr & Ruggles*, for the plaintiff.

*Charles F. Blake*, for the defendants.

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THE ATLANTIC GIANT POWDER COMPANY

vs.

JASPER R. RAND AND OTHERS. IN EQUITY.

The reissued letters patent, No. 5,799, granted to the Giant Powder Company, March 17th, 1874, for 17 years from the 26th of May, 1868, for an "improved explosive compound," (the original patent having been granted to Julius Bandmann, as assignee of Alfred Nobel, as inventor, as No. 78,317, May 26th, 1868,) are valid.

The claim of said patent, namely, "The combination of nitro-glycerine with infusorial earth, or other equivalent absorbent substance, as a new explosive compound," is infringed by an explosive compound known as "rendrock powder," and containing, in 100 parts by weight, 34.71 parts of nitro-glycerine, 52.68 parts of nitrate of potash, 5.84 parts of sulphur and 6.77 parts of woody fibre, charcoal and resin, in nearly equal proportions.

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The Atlantic Giant Powder Company v. Rand.

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Said reissued patent is not for a different invention from the said original patent.

The specifications of the original and the reissue examined and compared.

Where a defendant has always been notified that it was claimed he infringed, and has not been misled, by any action of the plaintiff, into making investments, and has no peculiar equity as against the plaintiff, an injunction will not be withheld because the plaintiff, having sued the defendant for infringement, permitted the suit to rest until a recovery was had on the patent in other suits, and then discontinued it and brought a new suit against the defendant.

A description in a prior patent, to invalidate a subsequent patent, must show how the article can be certainly made, and its making must be the result of directions in the description, and not of accident.

(Before BLATCHFORD, J., Southern District of New York, May 5th, 1879.)

BLATCHFORD, J. This is an application for a preliminary injunction, founded on reissued letters patent, No. 5,799, granted to the Giant Powder Company, March 17th, 1874, for 17 years from the 26th of May, 1868. The original patent was granted to Julius Bandmann, as assignee of Alfred Nobel, of Hamburg, Germany, the inventor, as No. 78,317, May 26th, 1868. Bandmann assigned the patent to the Giant Powder Company, and it was reissued to them October 21st, 1873, as No. 5,619. On the surrender of No. 5,619, reissue No. 5,799 was granted. The plaintiff is the owner of No. 5,799 for all the States and territories of the United States which lie east of the easterly boundary lines of the territories of Montana, Wyoming, Colorado and New Mexico. The application for No. 5,799 was filed March 11th, 1874. The specification of No. 5,799 is signed by the Giant Powder Company. It begins by setting forth that Nobel invented "an improved explosive compound, of which the following is a specification." It then proceeds: "This invention relates to a new and useful combination or mixture of nitro-glycerine with some absorbent substance, whereby the condition of the nitro-glycerine is so modified as to render the resulting explosive compound more practically useful and effective as an explosive, and far more safe and convenient for handling, storage, and transportation, than nitro-glycerine in its ordi-

nary condition as a liquid. The invention consists in combining or mixing with nitro-glycerine some porous or absorbent substance, which, being free from any quality which will cause it to decompose, destroy or injure the nitro-glycerine, forms, in combination with it, an explosive compound possessing certain marked properties of great practical utility, which not only increases its efficiency, but also obviates many of the serious practical objections to the employment of nitro-glycerine as an explosive. Some of these peculiar properties of this mixture will be briefly stated. Nitro-glycerine being a liquid, it is usually necessary, in exploding it as an explosive for blasting purposes, to place it in cases or cartridges formed of paper, metal or other substance, which must, of course, be of somewhat smaller diameter than the bore holes, as, if not so inclosed, the nitro-glycerine would permeate the seams of the rock, and prove highly dangerous to the miner, on account of its liability to explode in subsequent drillings; but, by means of this invention, the nitro-glycerine, being held in combination with the porous or absorbent substance with which it is mixed, and then assuming the altered form of a powder or paste, remains in the bore hole in which it is placed, without leaking through the seams of the rock. Another advantage over liquid nitro-glycerine is, that this mixture can be made to fill the bore hole more closely than a cartridge case will, owing to the irregularities of the shape of the hole, which greatly increases its efficiency. The liability of fluid nitro-glycerine to accidental explosion from agitation or concussion, renders its handling and transportation very dangerous. This danger is, however, almost entirely obviated by the use of the compound described in this specification, because, when mixed with a suitable absorbent, the nitro-glycerine is far less sensitive to shocks than when in a liquid condition, so that it may be handled in mass, either loose or in packages, with impunity. So much is this the case, that, when this mixture is packed in a wooden case or box, the inclosure may be knocked to pieces without danger of exploding its contents. This invention, then, consists

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The Atlantic Giant Powder Company v. Rand.

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in mixing liquid nitro-glycerine with some solid (as distinguished from liquid or fluid) substance, which will absorb and retain a sufficient amount of nitro-glycerine to form an efficient explosive. The substance which is believed to be best adapted for this purpose, is a kind of silicious earth, found in various parts of the globe, and known by the various names of silicious marl, tripoli and rotten stone. The peculiar variety of this material best suited for this use is homogeneous, has a large specific gravity and great absorbent capacity, and is generally composed of the remains of infusoria. So great is the absorbent capacity of this infusorial earth, that, when in a pulverized condition, it will take up about three times its own weight of liquid nitro-glycerine, and still retain the form of a powder. Other porous substances, even though they have less absorbent capacity, may be used; but, in this case, the explosive strength of the powder will be diminished, owing to the smaller proportion of nitro-glycerine contained therein. Chalk, for example, will absorb about fifteen *per cent.* of nitro-glycerine and retain its powdered condition; and porous charcoal, although of greater absorbent capacity, has less elasticity of particles, so that nitro-glycerine is apt to squeeze out of it. Any of the various vegetable or mineral substances susceptible of pulverization or comminution, and which will retain nitro-glycerine by absorption, may be substituted for infusorial earth. The relative proportion of the ingredients used in making this new explosive compound will vary according to the absorbent capacity of the substance mixed with the nitro-glycerine, it being preferable in all cases—and this is the only limit—to use so much only of the liquid nitro-glycerine as the absorbent substance will retain without liability to subsequent separation by compression or leakage. Where the absorbent used in a powdered condition is infusorial earth, a thin paste or semi-fluid condition of the mixture is to be avoided. The method of making this new explosive compound with infusorial earth is as follows: The earth being first thoroughly dried and pulverized, is placed in any suitable vessel, and the nitro-glycerine

is then gradually introduced and thoroughly mixed with the powdered earth, which is effected either by stirring with the naked hand or by means of any suitable wooden instrument, worked either by machinery or by hand. Where infusorial earth is used, the proportions may be conveniently varied, from sixty parts, by weight, of liquid nitro-glycerine, and forty parts, by weight, of infusorial earth, to seventy-eight parts, by weight, of nitro-glycerine, and twenty-two parts, by weight, of infusorial earth, the former proportions forming, at ordinary temperatures, a dry, pulverulent mass, and the latter a pasty mixture. These proportions may, however, be varied outside of the limits above stated, it being observed, that the explosive force of the mixture is increased where a larger proportion of nitro-glycerine is employed, and that, when the mixture is to be used in a cold climate, a larger quantity of nitro-glycerine may be safely employed than when it is to be exposed to a warmer atmosphere. For ordinary practical purposes, a mixture of seventy-five parts, by weight, of nitro-glycerine, and twenty-five parts, by weight, of infusorial earth, gives a powder sufficiently dry at ordinary temperatures, and which is susceptible of compression to a specific gravity nearly equal to that of pure nitro-glycerine. When the ingredients have been intimately mixed and thoroughly incorporated, by stirring and kneading, the compound may be rubbed through a sieve made of hair, silk or brass wire, and any lumps which remain may be powdered by rubbing them through the sieve with a stiff bristle brush. The powder is then ready for use, and may be packed in bulk in boxes, or compressed into cartridge cases made of paper, of such convenient sizes as may be most in demand for blasting purposes. A greater or less degree of fineness of grain may be given to the powder by using a fine or coarse sieve. In using this improved explosive compound for blasting, it may be inserted into cartridge cases, as above stated, or without any inclosure or wrapping, as may be preferred. For the best effect, it should be pressed firmly down so as to fill the bore hole, whether in cartridge or not, a small quantity at a time, with

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The Atlantic Giant Powder Company v. Rand.

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a wooden rod, until it is firmly packed. If the cartridges are smaller than the bore, the pressure will burst them, and allow the powder to spread laterally and fill the bore. It may be easily and efficiently exploded by means of an ordinary blasting fuse inserted into the open end of a percussion cap, the metallic edges of the cap being compressed or crimped tightly and firmly around the fuse, so as to hold it in place, with the end of the fuse in close contact with the fulminate in the percussion cap. The capped end of the fuse is then inserted into the explosive powder, which is pressed closely around it in the bore hole, and a tamping of sand or other suitable material may be placed above the charge of powder, and pressed down upon it. The fuse thus applied is fired in the ordinary manner, and, when the fire reaches the percussion cap, it explodes, which effects the immediate explosion of the charge of explosive compound. It is better to use a percussion cap having a heavy charge of fulminate, in order to insure an explosion of the powder, although, under favorable circumstances, it might be exploded with an ordinary fuse, without any cap; but this method is too uncertain to be relied upon. For ordinary blasting, the bore holes may be about one-half the size, and the charge of explosive compound about one-fifth the quantity, that would be made use of when gunpowder is used as the explosive." The claim is in these words: "The combination of nitro-glycerine with infusorial earth, or other equivalent absorbent substance, as a new explosive compound."

The infringement complained of is the making and selling by the defendants of an explosive compound known as "rend-rock powder," and which, by analysis, contains, in one hundred parts, by weight, the following ingredients in the following quantities: nitro-glycerine, 34.71 parts; nitrate of potash, 52.68 parts; sulphur, 5.84 parts; woody fibre, charcoal and resin, in nearly equal proportions, 6.77 parts. Mr. Hayes, the chemist who made such analysis, testifies, that the solid ingredients found in such powder constitute together an absorbent substance which is the equivalent of the infusorial

earth mentioned in the plaintiff's patent ; that such powder is a combination of nitro-glycerine with such absorbent substance, in substantially the same manner as the combination of nitro-glycerine and infusorial earth specifically mentioned in said patent ; that said solid ingredients have the property of absorbing and retaining by absorption nitro-glycerine, and are free from any quality which will cause them to decompose, destroy or injure nitro-glycerine ; that the nitro-glycerine is combined with such solid ingredients in such proportions as to be retained without liability to separation by compression or leakage ; that such solid ingredients are not liable to explode by concussion, as nitro-glycerine is ; that the entire combination constitutes a safety powder, which can undergo the ordinary shocks of transportation and manipulation without explosion ; that the nitro-glycerine therein is explosible, in blasting operations, by the means ordinarily employed for exploding nitro-glycerine ; that, while the mixture is in the form of a powder, the nitro-glycerine remains so compact and concentrated as to have its original explosive power ; that he has been unable to separate the carbonaceous woody fibre and the resin from the charcoal, so as to determine their percentage proportions with accuracy, but that they are not materially different from charcoal, as constituents of the powder ; and that they each have all the properties which the other solid ingredients of the powder have, as above described, for the purposes of performing the office of infusorial earth in the mixture. These averments in respect to the rendrock powder are not controverted by the defendants.

The rendrock made by the defendants is a composition of nitro-glycerine with an explosive substance, but it was admitted, on the hearing, by the counsel for the defendants, that the claim of the plaintiff's patent includes a mixture of nitro-glycerine with an explosive substance, as well as a mixture of nitro-glycerine with an inexplusive substance. It is very plain, therefore, that the claim of the plaintiff's patent covers the defendants' powder.

It is insisted, however, by the defendants, that the cause

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The Atlantic Giant Powder Company v. Rand.

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of litigation between the parties, in regard to the rendrock powder and the patent No. 5,799, has been such that the plaintiffs are not now entitled to a preliminary injunction. The view urged is, that the plaintiffs, owning No. 5,799, and also owning a reissued patent No. 4,818, brought a suit in equity in this Court on both of them, in 1874, against these defendants, for making this rendrock powder; that the plaintiffs took proofs in that suit to show that the rendrock powder, as a mixture of nitro-glycerine with an explosive substance, infringed No. 4,818; that they gave no evidence to show that it infringed No. 5,799; that they subsequently notified the defendants that they need not, until further notice, put in proofs in that case; that they then brought and prosecuted suits on No. 5,799, in another Court; and that, having been successful in those suits, they discontinued the first suit against the defendants, and brought the present one on No. 5,799 alone. It is urged that this course of action deprives the plaintiffs of the right to ask, in this suit, for a preliminary injunction. The answer to this contention is, that the defendants appear to have been always notified, by the existence of the first suit against them, and by the suit in Massachusetts against Goodyear, that the plaintiffs claimed that powders like the rendrock powder infringed No. 5,799. There is nothing to show that the defendants were misled into making investments by any action of the plaintiffs, or that they have any peculiar equity, as against the plaintiffs, to be allowed to continue to infringe the patent until a final hearing, while preliminary injunctions are granted against others making like powders.

It is urged by the defendants that the reissued patent No. 5,799 is for a different invention from the original, No. 78,317, and is, therefore, invalid. The specification of No. 78,317 says that the invention is "a new and useful composition of matter, to wit, an explosive powder." It proceeds: "The nature of the invention consists in forming out of two ingredients long known, viz.: the explosive substance, nitro-glycerine, and an inexplusive porous substance hereafter

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The Atlantic Giant Powder Company v. Rand.

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specified, a composition which, without losing the great explosive power of nitro-glycerine, is very much altered as to its explosive and other properties, being far more safe and convenient for transportation, storage and use than nitro-glycerine. In general terms, my invention consists in mixing with nitro-glycerine a substance which possesses a very great absorbent capacity, and which, at the same time, is free from any quality which will decompose, destroy or injure the nitro-glycerine or its explosiveness. It is undoubtedly true, as a general rule, that nitro-glycerine, when mixed with another substance, possesses less concentration of power than when used alone; but, while the safety of the miner, (to prevent leakage into seams in the rock,) prohibits the use of nitro-glycerine without cartridges, which latter must, of course, be somewhat less in diameter than the bore holes which are to contain them, the powder herein described can be made to form a semi-pasty mass, which yields to the slightest pressure, and thus can be made to fill up the bore hole entirely. Practically, therefore, the miner will have as much nitro-glycerine in the same height of bore hole with this powder as with nitro-glycerine in its pure state. This is the real character and purpose of my invention, and, in order to enable others skilled in the art to which it appertains, or with which it is most nearly connected, to make, compound and use the same, I will proceed to describe the same, and also the manner and process of making, compounding and using it, in full, clear and exact terms. The substance which most fully meets the requirements above mentioned, so far as I know or have been able to ascertain from numerous experiments, is a certain kind of silicious earth or silicic acid found in various parts of the globe, and known under the several names of silicious marl, tripoli, rotten stone, &c. The particular variety of this material which is best for my compound is homogeneous, has a low specific gravity, great absorbent capacity, and is generally composed of the remains of infusoria. So great is the absorbent capacity of this earth that it will take up about three times its own weight of nitro-glycerine, and still retain

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The Atlantic Giant Powder Company v. Rand.

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its powder form, thus leaving the nitro-glycerine so compact and concentrated as to have very nearly its original explosive power; whereas, if another substance having a less absorbent capacity is used, a correspondingly less proportion of nitro-glycerine will be absorbed, and the powder will be correspondingly weak or wholly inexplosive. For example, most chalk will take but about fifteen per cent. of nitro-glycerine and retain its powder form; twenty per cent. will reduce it to a paste. Porous charcoal has also a considerable absorbent capacity, but it has the defect of being itself a combustible material, and also of less elasticity of its particles, which renders it easy to squeeze out a part of its nitro-glycerine. The two materials are combined in the following manner: The earth, thoroughly dried and pulverized, is placed in a wooden vessel. To it is introduced the nitro-glycerine in a steady stream, so small that the two ingredients can be kept thoroughly mixed. The mixing may be effected by the naked hand, or by any proper wooden instrument used in the hand, or by wooden machinery. Sufficient of nitro-glycerine should be used to render the compound explosive, but not so much as to change its form of powder to a liquid or pasty consistency. Practically, about sixty parts, by weight, of nitro-glycerine to forty of earth forms the useful minimum, and seventy-eight parts, by weight, of nitro-glycerine to twenty-two of earth, the useful maximum of explosive power. The former has a perfectly dry appearance; the latter is pasty. Between these two extremes the composition will be explosive powder, and it will be more easily exploded, and its explosive power greater, as the relative proportion of the nitro-glycerine is greater. The proportions, by weight, of seventy-five of nitro-glycerine to twenty-five of earth gives a powder as well adapted to ordinary practical purposes as that from any proportions I am now able to name, and can be easily compressed to a specific gravity nearly equal to that of pure nitro-glycerine. When the mass has been intimately mixed and thoroughly incorporated by stirring and kneading, it is rubbed through a hair, silk or brass wire sieve, (iron cor-

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*The Atlantic Giant Powder Company v. Rand.*

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rodes,) and any lumps which may remain are rubbed with a stiff bristle brush till they are reduced and made to pass the sieve. The powder is then finished and ready for use. The fineness desired for the powder will determine the fineness of the sieve to be used. The chief characteristic of this powder is its nearly perfect exemption from liability to accidental or involuntary explosion. It is far less sensitive than nitro-glycerine to concussion or percussion, and, contained in its usual packing, a wooden cask or box, the latter may be smashed completely to pieces without any danger of explosion. Unlike gunpowder in the open air or in ordinary packing, a wooden cask or box, it burns up, when set fire to, without exploding. It can, therefore, be handled, stored and transported with less danger than ordinary gunpowder. When confined in a tight and strong inclosure, it explodes by heat applied in any form when above the temperature of 360° Fahrenheit. Under all other circumstances, it may be exploded by some other explosion in it or into it. The most simple and certain method known to me of exploding it is as follows: The end of a common blasting fuse is inserted into a percussion cap, and the rim of the cap crimped tightly and firmly about the fuse by nippers or other means, so as to leave the fulminating powder of the cap and the end of the fuse tightly and firmly inclosed together. The end of the fuse with the cap attached is then imbedded in the powder, the more firmly the more certain the explosion. In blasting, the powder is pressed tightly about the cap and fuse, and tamping of sand, or other proper material, added and pressed, but not pounded in. A tamping firmly pressed is as good as if rammed in the most solid manner. The fuse explodes the cap and this explosion explodes the powder. I will here add, that, by carefully packing the end of a good fuse amid the powder of a charge inclosed, like a blasting charge, in a tight place, the fuse alone will explode the powder, especially if the powder is strongly charged with nitro-glycerine; but this method of explosion requires too much care, and is too uncertain, to be depended upon or generally used. As before

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• The Atlantic Giant Powder Company v. Rand.

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stated, the more strongly the powder is charged with nitro-glycerine the more easily it explodes. If, therefore, the powder contains a low proportion of nitro-glycerine, it is necessary to employ in its explosion a correspondingly long, strong and heavily charged percussion cap, made especially for the purpose. For the sake of certainty of explosion, it is better to use such a cap in all cases. If the fire from the fuse comes in contact with the powder before the cap is exploded, (which is liable to occur if the fuse is leaky and the cap extends too far into the powder,) a portion of the powder will be burned before the explosion takes place. To guard against this, the cap should only be fairly inserted into the powder, and poor fuses wound next to the cap firmly with strong glued paper or hemp, or otherwise secured. The bore holes, as a practical but not absolute rule, should be about one-half the size, and the charge should be from one-fifth to one-tenth the quantity, ordinarily used in gunpowder blasting. A very convenient form in which to use the powder is to pack it firmly in cartridges of strong paper." The claim is in these words: "The composition of matter made substantially of the ingredients and in the manner and for the purposes set forth."

It is contended by the defendants that the invention set forth in No. 78,317 had for its declared object, the preparing of a solid composition of matter which should contain practically, in a given space, as much nitro-glycerine as could be put into that space in a liquid state, whereby the force of the nitro-glycerine would be preserved, while at the same time the inconvenience of using it as a liquid would be obviated; that No. 78,317 stated that to be the "real character and purpose" of the invention; and that No. 78,317 did not set forth that the inventor had in view, as an object, the safety character of the compound. It is urged that, in these respects, the reissue departs from the original; and that, as the claim in the original was a claim to the invention of a compound made substantially of the ingredients, and in the manner, and for the purposes set forth in the specification of the original, and

the reissue claims broadly the combination of nitro-glycerine with infusorial earth, or other equivalent absorbent substance, as a new explosive compound, ignoring the concentration feature as the character and purpose and essence of the invention, the original and the re-issue are for different inventions, and not for the same invention, and so the reissue is invalid.

The specification of No. 78,317 sets out with declaring that the invention is of an explosive powder. This means a powder, as distinguished from a fluid mixture, and a powder which will explode. It states that the composition forming the powder is made of nitro-glycerine and infusorial earth; that nitro-glycerine is explosive, and infusorial earth is inexplusive; that, while the explosive power of nitro-glycerine is preserved in the composition, the composition is more safe and convenient for transportation, storage and use, than nitro-glycerine; that, in general terms, the invention consists in mixing with nitro-glycerine a substance which possesses a very great absorbent capacity, and yet will not injure the nitro-glycerine or its explosiveness; that, generally, the mixture of nitro-glycerine with another substance causes the nitro-glycerine in the mixture to possess less concentration of power than when it is not so mixed; that, while liquid nitro-glycerine must be used in cartridges, which must be less in diameter than the bore hole, this new powder can be made into a semi-pasty mass, and be used without cartridges, and so fill the bore hole entirely; and that thus, by using this new powder, the miner will have, in a bore hole of a given size, practically as much nitro-glycerine, notwithstanding he has in the hole the infusorial earth also, as if he used a cartridge with liquid nitro-glycerine. The specification then says that what has thus been stated is the real character and purpose of the invention. That is, that, by the mixture of the nitro-glycerine with the absorbent substance, the explosive power of the former will be preserved and not injured, while the mixture will be more safe in use than the liquid nitro-glycerine, with the incidental result, that any loss of concentration of power in the nitro-glycerine, by mixing it with the other substance, will be compensated by the fact that the bore hole can be

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The Atlantic Giant Powder Company v. Rand.

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filled with the mixture while it could not be filled with liquid nitro-glycerine, and thus practically there will be the same quantity of nitro-glycerine in a given size of hole in one case as in the other. The specification then states, that the best substance to meet the above requirements is the infusorial earth, because it will take up about three times its own weight of nitro-glycerine, and yet retain its original powder form, so that, in four pounds of the mixture, there will be three pounds of nitro-glycerine, and that the latter will be so concentrated as to have very nearly its original explosive power; that, when a substance of less absorbent capacity than infusorial earth is used, a less proportion of nitro-glycerine will be absorbed, and the explosive power of the powder will be reduced; that, for example, most chalk will take but about 15 *per cent.* of nitro-glycerine and retain its powder form, while 20 *per cent.* will reduce it to a paste; and that porous charcoal, while absorbent, is combustible and will suffer what it absorbs to leak out. These remarks show that the inventor contemplated the use, also, of a substance having less absorbent capacity than the infusorial earth, resulting in a mixture with a less proportion of nitro-glycerine, and with a less explosive power than the mixture in which infusorial earth is used; and that the mixture was in all cases to be and remain in the powder form, and to be such as to retain the absorbed nitro-glycerine and not suffer it to leak out. The mode of preparing the mixture with infusorial earth is then set forth. Stress is laid on the requirement that enough nitro-glycerine must be used in the compound to render it explosive, while the earth, in dry powder, is not to have so much nitro-glycerine put with it as to change its form of powder to a liquid or a paste. The useful minimum and the useful maximum of explosive power are then stated, according to given proportional weights of nitro-glycerine to infusorial earth, the minimum compound having a perfectly dry appearance and the maximum compound being pasty. It is then set forth, that, between these two extremes the compound will be explosive powder, and that it will be more easily exploded, and its explosive power

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The Atlantic Giant Powder Company v. Rand.

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be greater, as the relative proportion of the nitro-glycerine in the compound is greater. These observations are to the effect, that the useful maximum of explosive power in the compound is attained when the absorption of nitro-glycerine causes the mixture to cease to have the form of powder; that the useful minimum of explosive power in the compound is what results from the stated proportion of nitro-glycerine; that, although so much as 78 parts by weight of nitro-glycerine to 22 of infusorial earth may be used, and still the compound be just leaving the powder form, yet, even in the use of infusorial earth, a useful result will be given when the nitro-glycerine is 60 parts by weight to 40 of the earth; and that between such maximum and such minimum the compound will be a powder and an explosive powder, with greater explosive power and more easy of explosion as the relative proportion of the nitro-glycerine is greater. The specification then states, that, when infusorial earth is used, the proportion, by weight, of 75 nitro-glycerine to 25 of earth will give a powder, and one as well adapted to ordinary practical purposes as can be specified, and one which can be made to have a specific gravity nearly equal to that of pure nitro-glycerine. Directions are then given how to treat the mixture to make it pulverulent. The specification then sets forth, that the chief characteristic of the powder is its nearly perfect exemption from liability to accidental or involuntary explosion; that it is far less sensitive than nitro-glycerine to concussion or percussion; that, unlike gunpowder, it burns up, when set fire to, without exploding; and that it can, therefore, be handled, stored and transported with less danger than ordinary gunpowder. The safety character of the powder is thus dwelt upon. It will not explode accidentally or involuntarily, because, first, fortuitous concussion or percussion will not be likely to cause it to explode; and, secondly, it will burn, and not explode, when set fire to. The specification then sets forth the proper method of exploding the powder, by exploding a percussion cap in it, with the injunction, that the percussion cap must be longer, stronger and

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The Atlantic Giant Powder Company v. Rand.

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more heavily charged, as the proportion of nitro-glycerine is less in the powder, for the reason, that, the greater the proportion of nitro-glycerine, the more easily will the powder explode. This analysis of the specification of No. 78,317 shows, that, taking the whole of it together, the concentration feature referred to, that is, the preparing of a solid compound which should contain practically, in a given space, as much nitro-glycerine as could be put into that space in a liquid state, was not set forth in that specification as of the essence of the invention; that such concentration feature was set forth as an incident of the use of the proportions of 75 parts of nitro-glycerine, by weight, to 25 of infusorial earth; that a compound of less nitro-glycerine and more earth, which would, of course, not have such concentration feature, was stated to be useful and to be within the invention; that the safety character of the compound was set forth as an object in view, in the invention; and that one feature of such safety character was alleged to consist in the diminished sensitiveness of the compound to accidental explosion from concussion or percussion, as compared with liquid nitro-glycerine. The reissue is, therefore, not open to the objection, that it departs from the original, in the respects mentioned.

The original patent speaks of the substance that is to be mixed with the nitro-glycerine as "an inexplosive, porous substance." The substances it mentions are the silicious or infusorial earth, chalk and porous charcoal. These substances are absolutely inexplosive, whether fire be applied to them or not, and without reference to the fact whether they will burn or not. Nitro-glycerine is liable to explode by accidental concussion or percussion. The proper and usual mode of exploding it is by designed percussion, that is, exploding something in it or into it. The object desired was to prevent its explosion by accidental percussion, and to ensure its explosion by designed percussion. In that view, and taking the whole of the original specification together, when the absorbent substance is spoken of therein as inexplosive, it clearly means

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The Atlantic Giant Powder Company v. Rand.

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inexplosive by percussion or concussion, as compared with nitro-glycerine. The object was to mix with the nitro-glycerine a substance which, not being liable, like nitro-glycerine, to explode by accidental percussion or concussion, would produce a powder not liable to explode by accidental percussion or concussion. The word "inexplosive" had reference to the explosive nature of nitro-glycerine. If the substance mixed with it acted its part of an absorbent, to make a powder safe from liability to accidental explosion by percussion, and yet a powder the nitro-glycerine in which could be exploded by designed percussion, and could not be injured, in its explosive quality, by such substance, it was, manifestly, entirely immaterial what became of such substance after the nitro-glycerine in the powder had been exploded, whether it did or did not itself burn up, or even though it should itself be caused to explode by the explosion of the nitro-glycerine, and thus perform a useful office, in addition to that of acting as such an absorbent as the specification prescribes. Such is the plain meaning of the language of the original specification.

The questions thus considered were, to some extent, passed upon by Judge Shepley, in his decision in the case of *The Atlantic Giant Powder Co. v. Mowbray*, (12 Off. Gaz. of Pat. Off., 560,) where this same patent was sued on. Objection was there made to the reissue, on the ground that the description of the invention was broader in the reissue than in the original patent. Judge Shepley held that the description of the invention in the original patent appeared to describe all that was more specifically described in the reissue, and stated that a careful comparison of corresponding passages in the original and reissue had failed to satisfy him that the reissue was open to objection on the ground of its being for an invention broader than, or different from, the one described in the original. He added, that he did not think that the omission of the word "inexplosive," in the reissue, rendered the reissue defective, or that the claim in the reissue was any broader than in the original.

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The Atlantic Giant Powder Company v. Rand.

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The defendants in the Mowbray case made a powder by mixing 52½ pounds of tri-nitro-glycerine with 47½ pounds of mica scales. Judge Shepley held, that, in the compound so made, the mica scales possessed all the properties which rendered the infusorial earth efficient and useful in the compound, as well as some additional valuable properties; and that the mica scales performed the same function, in the compound, that the infusorial earth did, as an absorbent of the nitro-glycerine.

Reissue No. 5,799 came again before Judge Shepley in the case of *The Atlantic Giant Powder Co. v. Goodyear*, (13 *Off. Gaz. of Pat. Off.*, 45,) where the defendant made a powder composed of 32.60 parts of nitro-glycerine, 49.46 of nitrate of soda, 9.63 of charcoal, and 8.31 of sulphur. The nitrate of soda, charcoal and sulphur were in the form of a mealed powder, their proportions being the same as in gunpowder in common use in the granular form. This mealed powder was mixed with the nitro-glycerine. It possessed, in the mixture, as Judge Shepley held, every property claimed for the infusorial earth in the plaintiff's patent, and the powder known as "Vulcan blasting powder," resulting from its combination with the nitro-glycerine, possessed every attribute and property, in a greater or less degree, possessed by the plaintiff's powder. It was set up, in the Goodyear case, as a defence, that the only object of Nobel's invention, as patented, was to render nitro-glycerine safer in handling and transportation, without any intent to augment its explosive force, because the substance mixed with the nitro-glycerine was inert; and that the object of the manufacturer of the Vulcan powder was "to render the explosion and combustion of gunpowder instantaneous." But Judge Shepley held, that the substitution of gunpowder, as used in the Vulcan powder, in combination with nitro-glycerine, in the place of the infusorial earth or other absorbent of the plaintiff's patent, did not make the combination a different, and not equivalent, compound, because the gunpowder, when used as an absorbent, in addition to fulfilling every condition, and performing every

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The Atlantic Giant Powder Company v. Rand.

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function, of the absorbent in the plaintiff's compound, up to the time of the explosion, and at that time, had then the additional function of co-operating, by means of its conversion into gas, with the nitro-glycerine, in rending the rock, instead of remaining, like the infusorial earth, an inert substance. In the Goodyear case, it was further contended for the defendant, that, as gunpowder was an explosive of itself, the use of it in the compound was no infringement, because the plaintiff was limited to a non-explosive substance as the absorbent; that, if the omission of the term "inexplosive," in the reissue, enlarged the scope of the invention, the reissue was void; and that, if the reissue was to be construed in connection with the original, and for the same invention, it must be limited to the use of inexplosive absorbents as equivalents. On this subject Judge Shepley said: "The word 'inexplosive' is applied, in the original patent, as a term of description to a substance only preferentially used. The other descriptions in the specification clearly apply to substances which, in one sense, may be explosive, but are inexplosive as compared with nitro-glycerine. The word 'inexplosive' appears clearly to have been used, in the original patent, to describe substances which, as compared with nitro-glycerine, were inexplosive by concussion, which would not, of themselves, explode under those conditions which rendered nitro-glycerine so dangerous and unsafe for practical use, and which, inexplosive of themselves under those conditions, when combined with nitro-glycerine, would make the combination a compound which would also be inexplosive, except under such conditions as were not inconsistent with substantial safety, in its use for blasting and similar purposes. In this sense, the mealed powder used by the defendants is inexplosive. It prevents, by the interposition of its particles, the explosion of the nitro-glycerine by any such concussion as would ordinarily explode it when uncombined with an absorbent. It makes the compound practically inexplosive under ordinary, fortuitous and accidental concussions, and practically explosive only under predetermined and prearranged conditions. The word is omitted in

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*The Atlantic Giant Powder Company v. Rand.*

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the reissue, and, we think, properly omitted, not for the purpose of including equivalents which were not within the scope of the original invention, as described, but as an ambiguous expression, not consistent with the other words in the specification, which clearly describe the absorbent, its properties and functions, all of which properties and functions, it is evident from a reading of the original patent, might appertain to a substance explosive under some conditions, but inexplusive under those conditions which made nitro-glycerine explosive by concussion, and dangerous and unsafe for practical use. The conclusion, therefore, I think, is a legitimate one, that, under the reissued patent, the owners of the patent are not limited to treat as infringements the use of such equivalents only as are actually inexplusive, but they are entitled to the exclusive use of such equivalents as are inexplusive as compared with nitro-glycerine, and which, while complying with the other requisites of the infusorial earth in the combination, will also, when combined with nitro-glycerine, form, out of the two ingredients, a composition which, without losing the great explosive power of nitro-glycerine, is more safe and convenient for transportation, storage and use than nitro-glycerine."

The first of these cases was a final hearing, the other was a motion for a preliminary injunction. Comity would induce a following of the views of a co-ordinate Court on questions so directly raised, considered and decided, especially where the decision was made by so careful and discriminating a Judge. Independently of this the observations cited meet the full concurrence of this Court.

It is contended, for the defendants, that what is claimed in No. 5,799 is described in a French patent and in an English patent, each previously issued. The French patent was taken out September 18th, 1865, by Nobel, for 15 years, and was delivered to him November 5th, 1863. It was for "improvements in the manufacture of mining and shooting powders." The descriptive memoir annexed to the patent is dated, Paris, September 18th, 1863. The French text is

not furnished to me. An English translation is furnished in these words: "The invention consists in the employment of explosive or easily decomposable substances, especially of explosive liquids mixed with ordinary powder, gun cotton or other analogous bodies. By this mixture one succeeds in tempering the breaking force of every fulminating substance, so as to heat it, if it is a liquid, to the degree of heat at which it explodes. There are many fulminating bodies that may be used for this purpose, such as nitro-glycerine, the nitrates of ethyle and methyle, &c. I use, by preference, nitro-glycerine, and I prepare it by introducing the glycerine slowly into a mixture of sulphuric acid and nitrate of soda or of potash, after having freed the liquor from the sulphate of soda or of potash, which is formed. This nitro-glycerine, mixed with or absorbed by the ordinary powder, communicates to it the following properties: 1. In appearance, it is dry, like ordinary powder; 2. It is much stronger, without producing a more breaking effect; 3. It produces less debris; 4. The explosion is a little slower. If it is only wanted to obtain this last effect, I mix with the powder, or I make it absorb, if it is already prepared, any other fluid, such as oil, &c. With regard to mining powder, it may be mixed with nitro-glycerine until it is wet on the surface. Nitrate of soda may then be used with advantage for the powder, as the nitro-glycerine prevents it absorbing the water. The nitro-glycerine, to explode, must be heated to 170° Centigrade. It is evident, that, besides ordinary powder, there are many mixtures which may determine this heating, but the explosive liquid must always be absorbed by their mass, and equally distributed in it; if not, there will always be breaking effects. Thus it is, that, in a powder formed solely of charcoal and sulphur, the nitro-glycerine will in a manner replace the salt-petre." On the 19th of January, 1864, a certificate of addition to the French patent of September 18th, 1863, was taken out in France by Nobel, and was delivered April 1st, 1864. The descriptive memoir annexed to such certificate of addition is dated Paris, January 19th, 1864. The French

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The Atlantic Giant Powder Company v. Rand.

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text is not furnished to me. Two English translations of it are furnished. One of them is in these words: "The numerous experiments which I have made since my first application have demonstrated to me that I could employ the substances mentioned in my patent of September 18, 1863, (nitro-glycerine and others,) both as powder for war or sporting, and as mining powder, under the following forms: 1. Absorbed in the powder, as described by the first patent, for shooting powder. 2. Mixed with the powder, which they wet more or less. 3. In a cartridge, with or without powder; in the former case, the powder surrounds or environs the cartridge, which may be of wood, zinc or any other material. In mines, and especially in galleries, I make use of cartridges soldered hermetically; and, to avoid smoke, gun cotton replaces the powder. It is, then, the powder or the gun cotton, placed around the cartridge, which pierces its walls and communicates the fire to the interior. 4. Absorbed in charcoal or other porous substances, it is still, as in the preceding cases, the powder or an analogous agent, which determines the explosion. As the nitro-glycerine mixed with the powder is denser than the latter, it is often important to economize it. Wherever less force is wanted for breaking than for raising the rock, and the pressure of the gas is of more consequence than its volume, I close with wood or any other substance a part of the cylindrical hole, to the height filled by the powder, as shown in the annexed sketch. This method may also serve sometimes for ordinary powder. The introduction of hermetical cartridges, hitherto not in use, facilitates the employment, even alone, of the powder with nitrate of soda, being preserved from dampness, whence results a notable economy. I shall observe, in closing, that the proportions of the mixture of the powder with the nitro-glycerine may vary according to the nature of the applications, and that, consequently, nothing can be stated precisely with regard to them." The other translation is in these words: "The numerous experiments which I have made since my first application have demonstrated to me that I

could employ the substances mentioned in my patent of September, 18, 1863, (nitro-glycerine and others,) as well for powder for military purposes (or for hunting purposes) as for blasting powder, under the following forms: 1st. Absorbed in the powder, as the first patent for gunpowder indicates. 2d. Mixed with the powder, which they moisten more or less. 3d. In a cartridge, with or without powder; in the first instance, the powder surrounds or encases the cartridge, which may be of zinc, wood or any other substance. In mines, and especially in galleries, I make use of cartridges hermetically sealed; and, to avoid all smoke, gun cotton replaces the powder. It is, then, the powder or the gun cotton placed around the cartridge, which perforates the walls and communicates the fire to the inside. 4th. Absorbed in charcoal or other porous substances, it is still, as in the preceding cases, the powder, or an analogous agent, which causes the explosion. As nitro-glycerine mixed with powder is more dense than this latter, it is often important to economize it. Where less force is needed to break than to carry away the rock, and where the pressure of the gas is of more importance than its volume, I close with wood or any other substance a part of the cylindrical hole, up to the height of which the powder fills it, as the sketch opposite indicates. This method may also sometimes serve for ordinary powder. The introduction of hermetically sealed cartridges, hitherto unemployed, facilitates the use, even by itself, of powder, being protected from moisture, whence results a noteworthy economy. I will remark, in conclusion, that the proportions of the mixture of the powder with the nitro-glycerine may vary according to the value of the applications, and that, therefore, one cannot be definite in this respect." The English patent was dated September 24th, 1863, and was sealed March 1st, 1864. It was granted to Alfred Vincent Newton for "improvements in the manufacture of gunpowder and powder for blasting purposes," and the invention was "a communication from abroad by Alfred Nobel." The provisional specification,

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The Atlantic Giant Powder Company v. Rand.

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dated September 24th, 1863, declared the nature of the invention to be as follows: "This invention consists in the employment of explosive substances, or of substances easily decomposed, especially of explosive liquids, mixed with ordinary gunpowder, gun cotton, or other analogous substances. By this mixture, the exploding force of every fulminating substance may be tempered or regulated; if it be a liquid, it may be heated to the degree necessary to cause explosion. There are many fulminating substances which may be used for this purpose, such as nitro-glycerine and the nitrates of ethyle and methyle. By preference, nitro-glycerine is used, and is prepared by introducing slowly glycerine into a mixture of sulphuric acid and nitrate of soda or potash, after having removed from the liquid the sulphate of soda or potash which is formed. This nitro-glycerine is to be mixed with or absorbed into the ordinary powder, in such proportion, that the appearance will still be preserved of dry ordinary powder, and it will then be much more powerful without producing a greater explosive effect, it will create less foulness, and the explosion will be somewhat retarded. If this last effect only is desired to be obtained, the powder is mixed with, or made to absorb, when prepared, some other fluid, such as oil, in such quantity as not to destroy its granular character. As regards the blasting powder, it may be mixed with sufficient nitro-glycerine to render it damp at the surface. Nitrate of soda may then be employed with advantage for the powder, as the nitro-glycerine prevents it from absorbing water. The nitro-glycerine, to cause explosion, should be heated to 170° Centigrade. It is evident, that, besides the ordinary powder, there are many mixtures that may determine the degree of heat, but it is always necessary that the explosive liquid should be absorbed by their mass, and equally distributed therein; if not, it will always have a bursting effect. It is thus, that, in powder formed solely of carbon and sulphur, the nitro-glycerine will replace, to some extent, the saltpetre." The full specification, dated and filed March 23d, 1864, is in these words: "This invention relates

chiefly to the utilization of certain substances known to chemists as organic nitrates or liquid nitrates, which are capable of being easily decomposed into gases, by combining the same with ordinary gunpowder or analogous substances, to produce an improved powder suitable either for ammunition or blasting purposes. By this mixture the exploding force of every fulminating substance may be tempered or regulated; or, if it be a liquid, the heat generated by ignition may be transmitted through the mass at the degree necessary to cause explosion. There are many fulminating substances which may be used for this purpose, such as nitro-glycerine and the nitrates of ethyle and methyle. By preference, nitro-glycerine is used. This substance may be prepared by introducing slowly glycerine into a cool mixture of sulphuric acid and nitric acid, or sulphuric acid and nitrate of soda or potash, the sulphate of soda or potash which is formed being removed from the liquid. This nitro-glycerine is to be mixed with, or absorbed into, ordinary gunpowder, in such proportion that the appearance will still be preserved, of dry ordinary powder, and the mixture will then act most efficiently without producing a greater explosive effect, it will create less foulness, and the explosion will be somewhat retarded. When the retardation only of the explosive action is desired to be obtained, the powder is mixed with, or made to absorb, when prepared, some other fluid, such as oil, in such quantity as not to destroy its granular character. As regards the blasting powder, it may be mixed with sufficient nitro-glycerine to render it damp at the surface. Nitrate of soda may then be advantageously employed, for, as nitro-glycerine is neither hygroscopic nor even soluble in water, it will, by being made to surround the nitrate of soda, effectually prevent that substance from absorbing water. The nitro-glycerine, to cause explosion, should be heated to one hundred and seventy degrees Centigrade. It is evident, that, besides the ordinary powder, there are many mixtures that may determine the degree of heat, but it is always necessary that the explosive liquid should be absorbed by their mass and equally distrib-

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The Atlantic Giant Powder Company v. Rand.

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uted therein ; if not, it will always have a bursting effect. It is thus, that, in powder formed solely of carbon and sulphur, the nitro-glycerine will replace, to some extent, the saltpetre." The claim is: "Producing explosive mixtures by treating gunpowder or analogous substances in the manner and for the purposes above set forth."

It is quite clear that these French and English patents set forth that nitro-glycerine is to be mixed with gunpowder, and that the resulting compound is to be used, in the shape of a dry powder, for shooting and blasting purposes. The nitro-glycerine is stated to be absorbed by the gunpowder. But, throughout these patents, there is no allusion to the explosion of the compounded powder by the detonation or percussion of the nitro-glycerine in it, or to the explosion of the gunpowder in it by the prior explosion of the nitro-glycerine in it. On the contrary, the suggested method of exploding the compounded powder, is by the ignition, first, of the gunpowder in it and the communication to the nitro-glycerine in it of the heat generated by the burning or exploding gunpowder, so as to cause the explosion of such nitro-glycerine. There is no allusion to the fact, that nitro glycerine can be exploded by percussion or detonation, or that it ought to be so exploded, or that it is liable to be exploded by accidental concussion, or that it is, therefore, unsafe in being handled or transported, or that it is, when mixed with a suitable absorbent, less sensitive to shocks than when in a liquid condition, or that the proportions of nitro-glycerine and absorbent should be such that the absorbent will retain what it absorbs and not let it leak out, and that there should be sufficient nitro-glycerine to form an efficient explosive when designedly exploded by concussion. These are all distinctively described features, in No. 5,799, of the powder there described, and they are none of them described in the French and English patents as features of the compound of nitro-glycerine and gunpowder there referred to. It was not until July, 1864, that it was suggested, so far as appears, that nitro-glycerine could be practically used by exploding it by deto-

nation. In Nobel's English patent No. 1,813, the provisional specification of which was dated July 20th, 1864, he suggests the explosion of a percussion cap or detonating compound to explode a portion of the nitro-glycerine, and thus heat the rest of the mass to the exploding temperature.

It is equally clear that the rendrock powder of the defendants is not described in the French and English patents referred to, or in any of them. It is composed of nitro-glycerine and an explosive substance analogous to gunpowder, and so far it has a resemblance to the compound produced under the English and French patents referred to, but, in respect of the qualities, before pointed out, which it has in common with the compound patented by No. 5,799, no allusion to those qualities is found in the English and French patents referred to. The powder of the defendants contains enough nitro-glycerine to be exploded designedly by detonation or concussion, and not enough to yield up any by leakage after absorption. It is a safety powder against accidental explosion by concussion, and yet can be exploded by designed concussion at its place of useful service. The English and French patents referred to do not describe any such powder, or give directions whereby any such powder can be certainly made. If any one, seeking to compound a powder under those patents, had compounded a powder possessing the qualities of the powder set forth in No. 5,799, or the qualities of the defendants' powder, so far as the qualities of the latter powder correspond with the qualities of the powder of No. 5,799, the making of such powder would have been a matter of pure accident, and not the result of any directions in the English and French patents, either as to the qualities of the powder or the law of its composition. This leaves the invention in No. 5,799 a patentable invention, within the recognized decisions on the subject. Especially is this so, when it is not shown that any one had, in fact, before Nobel set forth the description in the original patent No. 78,317, made a powder possessing the qualities of the powder of that patent, or a powder possessing the qualities which the

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The Atlantic Giant Powder Company v. Rand.

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defendants' powder has in common with the powder of No. 78,317, by undertaking to follow the directions in the English and French patents referred to. In inventing what he patented in No. 78,317, Nobel did not merely find out a new property in an old compound. He invented a new compound possessing new properties, and pointed out how the new compound could certainly be made so as to possess such new properties.

The defence that No. 78,317 was void because the invention was patented in a foreign country more than six months before the application for No. 78,317 was made in the United States fails in one respect, when it is decided that the French and English patents referred to did not set forth or patent such invention. If the English patent to Nobel, No. 1,345, be regarded as a patent for the same invention found in No. 78,317, and as having been granted more than six months before Nobel's application for No. 78,317, still No. 78,317 was not invalid, because it does not appear that the invention covered by it was introduced into public and common use in the United States prior to the application for No. 78,317. It does not appear satisfactorily that the Howden compound was the compound of No. 78,317 or of No. 5,799, by being prepared under the conditions prescribed in those patents, or by possessing the qualities of the compound of those patents; nor does it appear that the use made of it was an introduction of it into public and common use, in the United States, before April 27th, 1868, the date of the application for No. 78,317. Under these views, the question as to when No. 5,799 will expire is immaterial, in the present case, for it is still in force, even though its duration should hereafter be held to be only 14 years from the date of publication of the English patent No. 1,345.

Another defence is set up. A patent, No. 50,617, was granted to Nobel October 24th, 1865, for "substitute for gunpowder." This patent having been reissued as No. 3,380, April 13th, 1869, was reissued March 19th, 1872, in five divisions, to the United States Blasting Oil Co. One of

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The Atlantic Giant Powder Company v. Rand.

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those divisions is No. 4,818, Division D. The defence is, that, if No. 5,799, being the reissue of a patent granted in 1868, claims that which is described in No. 4,818, then No. 5,799 is invalid, because No. 4,818 is the reissue of a patent granted in 1865. The basis of this proposition is, that No. 4,818 describes the invention patented by No. 5,799. No. 4,818 describes a method of promoting the explosion of nitro-glycerine by compounding with it other more easily explosive substances. The specification of No. 4,818 says: "There is a class of explosives long known, but not at the date of Nobel's invention applied to technical purposes, in consequence of practical difficulties in procuring their explosion. Such substances are nitro-glycerine, the nitrates of ethyle and of methyle and nitro-manite. These substances are liquid at ordinary temperatures, and by that characteristic are distinguishable from solid explosives, such as gunpowder, gun cotton, &c.; and they have also the property that fire may be applied to them without their exploding. Nitro-glycerine, for example, if ignited in an open space, is slowly decomposed and takes fire, but the flame is apt to die out when the match is withdrawn. Hence, it cannot, under ordinary circumstances, be looked upon as a ready explosive agent, for, while gunpowder and other substances used as explosives prior to Nobel's invention always explode or deflagrate throughout their whole mass, when fire is set to them, nitro-glycerine and the analogous substances before named will not explode from the mere contact of flame. So, also, if a drop of nitro-glycerine be poured on an anvil, the blow of a hammer causes it to explode, but only that part is involved which has received the blow, so that, in this case, the explosion is merely a local one. A principal object of Nobel's invention consists in the removal of this obstacle to the use of nitro-glycerine and the analogous substances before named as explosives." The specification then states, that Nobel discovered that the difficulty referred to could be overcome by mixing or combining the nitro-glycerine and the other liquid substances with gunpowder, gun cotton or other similar substances, in

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The Atlantic Giant Powder Company v. Rand.

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proportions which "may be varied to suit the pleasure or convenience of the user or manufacturer." It says: "The nitro-glycerine may be mixed with gunpowder or gun cotton, either of which will absorb a considerable quantity of nitro-glycerine, say, thirty *per cent.*, more or less, in such proportions as to make the compound either wet or comparatively dry. If mixed with gunpowder, it may be either absorbed with it, by pouring the nitro-glycerine on the mass of gunpowder, or the two may be mingled together by trituration, the powder in the nitro-glycerine. The effect of these combinations will produce an explosive especially suitable for certain blasting purposes, for example, in crevice rock, and greatly superior either to gunpowder or gun cotton in explosive force, and quite readily exploded, so that it may be fired and exploded by means of a match or electric spark, in like manner as gunpowder or gun cotton alone. By means of this combination with gunpowder, gun cotton, or other similar readily explosive substances, of nitro-glycerine and the analogous substances before named, which are liquid at the ordinary temperature, these substances, which had not, at the date of Nobel's invention, been applied to any technical use as explosives, owing to their difficulty of explosion, have been introduced from the domain of science into that of practical use in the arts, and have rendered of commercial value what was previously known as a mere chemical curiosity." The claims of No. 4,818 are in these words: "1. The utilization, as explosives, of nitro-glycerine, and the analogous liquid substances hereinbefore mentioned, by combining therewith gunpowder, gun cotton, or other similar substances developing a rapid heat on combustion, substantially as hereinbefore described. 2. The combination of gunpowder with nitro-glycerine, substantially as and for the purposes hereinbefore described. 3. The combination of gun cotton with nitro-glycerine, substantially as and for the purposes hereinbefore described." The construction hereinbefore given to No. 5,799 shows, that neither the invention covered by it, nor the defendants' powder, is described in No. 4,818. The de-

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The Atlantic Giant Powder Company v. Rand.

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scription in No. 4,818 only describes nitro-glycerine absorbed by gunpowder, so as to enable the nitro-glycerine to be exploded by igniting the gunpowder; and there is no hint in No. 4,818 of making a compound with a safety property of non-explosion by ordinary concussion, and with the ingredients existing in the proportions necessary to attain the result of certain explosion of the nitro-glycerine by designed detonation or percussion, and of freedom from liability to explosion by accidental concussion. This I understand to have been the view taken of No. 4,818 by Judge Shepley, on the hearing in the Goodyear case, No. 4,818 having been called to his notice in that case.

All the views urged on the part of the defendants have been carefully considered. The plaintiff's patent has been sustained by Judge Shepley, on final hearing, in the Mowbray case, and on a motion for a preliminary injunction, in the Goodyear case, and, in the latter case, against a compound to all intents like that made and sold by the defendants in this case, and nothing is now shown to justify a denial of the injunction now asked for. It is, therefore, granted.

*George Gifford and Causten Browne, for the plaintiff.*

*Edward N. Dickerson and Charles C. Beaman, Jr., for the defendants.*

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The Atlantic Giant Powder Company v. Parker.

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## THE ATLANTIC GIANT POWDER COMPANY

vs.

ANDREW J. PARKER AND OTHERS. IN EQUITY.

The reissued letters patent No. 5,799, granted to the Giant Powder Company, March 17th, 1874, for an "improved explosive compound," (the original patent having been granted to Julius Bandmann, as assignee of Alfred Nobel, the inventor, as No. 78,317, May 26th, 1868,) are valid.

The decision in *Atlantic Giant Powder Co. v. Rand*, (*ante*, p. 250,) confirmed.

The claim of that patent is infringed by a powder called "Neptune Powder," composed of 56 parts of nitrate of soda, 14 parts of charcoal, and 30 parts of nitro-glycerine.

A description in a prior patent, to invalidate a subsequent patent, must be such as to show that the article described in the subsequent patent can be certainly arrived at by following the prior description.

(Before BLATCHFORD, J., Southern District of New York, May 5th, 1879.)

BLATCHFORD, J. This is an application for a preliminary injunction founded on reissued letters patent No. 5,799, granted to the Giant Powder Company, March 17th, 1874, the original patent having been granted to Julius Bandmann, as assignee of Alfred Nobel, the inventor, as No. 78,317, May 26th, 1868, being the same reissue considered in the case of the same plaintiff against Jasper R. Rand and others, (*ante*, p. 250,) decided herewith. The powder of the defendants in the present case is known as Neptune powder, and is composed of 56 parts of nitrate of soda, 14 parts of charcoal, and 30 parts of nitro-glycerine. It is the same powder which was held by this Court, in May, 1870, in the case of the same plaintiff against the Neptune Powder Company, to be an infringement of No. 5,799. Many views now urged in defence in this case have been considered at length and overruled in the decision in the case against Rand. Those views were, to some extent, presented and passed upon in the case against

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The Atlantic Giant Powder Company v. Parker.

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the Neptune Powder Company, but no written decision was given in that case. There are, however, some points taken in the present case which are not discussed in the decision in the Rand case, and those points are also urged as grounds for dissolving the injunction granted in the case against the Neptune Powder Company.

Stress is laid on the fact that a compound made of 30 *per cent.* of nitro-glycerine and 70 *per cent.* of infusorial earth, will not explode, while the defendants' compound will explode, although it has but 30 *per cent.* of nitro-glycerine, and its gunpowder ingredients will not absorb a greater amount of nitro-glycerine. But, it is a plain direction of the patent, that an absorbent must be used which will absorb and retain sufficient nitro-glycerine to make the compound explodable by detonation, at the place of designed use. The less the absorbing and holding capacity of the absorbent, the less the explosive force of the nitro-glycerine absorbed, because the less the quantity of nitro-glycerine absorbed. There is nothing in the patent which admits of the use of an absorbent which will not, with the nitro-glycerine, make a compound explodable by detonation, or of the use, with an absorbent which will absorb and hold sufficient nitro-glycerine to make a compound explodable by detonation, of an insufficient quantity of nitro-glycerine for such purpose. It is, therefore, of no consequence that a particular proportion of nitro-glycerine with a particular absorbent will not make a compound explodable by detonation, such compound being outside of the patent.

On the question of novelty, a book published in Germany, in the German language, is introduced, called Dingler's Polytechnic Journal, volume 171, 1864, page 443, cviii. The particular article is headed: "On Nobel's blasting powder, improved by addition of nitro-glycerine. By B. Turly, mining engineer." The translation of the text is as follows: "W. Nobel, an engineer of Stockholm, has taken out a patent in different countries for an improved blasting and shooting powder. His improvement consists in making the ordinary

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The Atlantic Giant Powder Company v. Parker.

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powder considerably stronger by an addition of nitro-glycerine. As is known, nitro-glycerine is a very clear oleaginous liquid, is ignited at about  $170^{\circ}$  C., without exploding, but burns slowly away with a crackling and snapping noise. If this oil is poured on a solid foundation and struck heavily with an iron hammer, it explodes with a violent detonation, but only on the spot where the hammer touches the liquid, while all the rest of the mass of oil remains unchanged, that is, unexploded. The combustion of the liquid follows without the development of any gas perceptible by the odor. From this relation this much appears, that this mass, in and of itself, is quite harmless, and requires a strong concussion or blow to make it partially explode; that its employment has, at least, no greater danger than that of common powder. But, in combination with common powder, nitro-glycerine develops a very considerable strength, and this new nitro-glycerine powder is at least three to five times stronger than ordinary powder or blasting powder. In the fortress of Carlborg, on the Wetten Lake, Mr. Nobel has made experiments with his powder in the presence of a commission. Bomb shells with ordinary and the improved powder were bursted, and the effect of the latter is said to have been five to seven times that of the ordinary powder. The experiments of blasting rocks, performed in my presence, have, however, in general, shown only a three times greater development of strength, but always the result that merits the greatest attention. Besides, it is not to be left out of the consideration, that a bore hole can only be quite generally compared with a grenade or bomb; that, while these missiles consist of homogeneous cast iron, in which the strength must show itself proportionally much greater—in a bore hole in a rock, in most cases, a certain part of the force is uselessly lost, so that, consequently the effect will be proportionally a smaller one than in the former case. Nevertheless, this new powder is an essential improvement on the old, and, when it passes a wholesale test, of which there is no present reason to doubt, it will find the greatest recognition and most extended employment by the mining public.

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The Atlantic Giant Powder Company v. Parker.

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The blasting experiments were performed as follows: The powder employed is distinguished from the blasting powder here in use by being much finer and not round but oblong and angular. Mr. Nobel shows this powder for common Swedish cannon powder, which has the same price as the mining powder of Nora. The improved powder was used in cartridge shells of sheet zinc, 18 millimetres in width, and in lengths of from 75 to 100 and 200 millimetres. These zinc shells, which are open at one end, are filled with the ordinary cannon powder, and, when the filling is completed, as much nitro-glycerine is poured upon it as can find room in the interstices of the powder. The powder, moistened with the oil, has a 40 per cent. (?) greater weight. After the cartridge is filled with powder and oil, it is tightly closed with a stopper of cork 20 millimetres long. It will be better to solder the cartridge. The charging of the hole is performed as follows: The bore hole, which, at its lower end, must have a width 4 to 6 millimetres greater than the thickness of the cartridge, is, of course, made dry. The cartridge is so inserted in it that the cork comes towards the bottom, that is, touching the solid rock. The space between the cartridge and the wall of the bore hole is now filled up with cannon powder, so that the latter surrounds the cartridge as completely as possible, (according to Mr. Nobel, the soldering should offer no difficulties—perhaps it suffices to pour sulphur on the cartridge—) being, also, 15 to 30 millimetres over the cartridge. This powder serves only for the ignition of the charge, for the bursting of the cartridge. The fuse is then stuck into the touch-hole, and the hole is not filled quite as usual, only care must be taken not to injure the cartridge with the tamper, on which account the first tamping is only made very loosely. If the hole is sufficiently wide, the fuse may be fastened to the cartridge with a piece of thread, and then it is not necessary to take so much igniting powder. It seems better, however, not to be sparing with the latter, in order to insure the explosion of the blast. On the explosion of the blast it is

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The Atlantic Giant Powder Company v. Parker.

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found that the detonation is a much weaker one than with common mining powder. A few examples of the effect of this powder will here be sufficient: 1. A hole 18 inches deep was discharged three times with a 9-inch mining cartridge, without showing the slightest effect; the same hole was charged with a 6-inch glycerine cartridge, and was well and completely broken up. 2. Several holes 24 inches deep, that usually here require mining cartridges 9 to 12 inches long, were well blasted with glycerine cartridges 3 inches in length. 3. Holes of 30 inches depth, that are otherwise charged with mining cartridges 18 inches long, broke with glycerine cartridges 6 inches long. From these experiments I have already deduced the conviction, that the degree of effect of this improved powder in blasting is at least three times that of the ordinary mining powder. The great advantage which will probably be obtained with this new powder will consist in this—that greater masses can be obtained at a time; that, consequently, the cost of production will be diminished. The charge of a single blast might be rather dear, but a workman will, perhaps, accomplish twice as much in the same time. First of all, will this powder be particularly valuable in building above ground and stone quarries—in general, in ample spaces where a great deal can be given to a single blast. Experiments still to be made must decide as to its utility in small spaces, confined quarters and works. Cartridges 18 inches in length might seem astonishingly large for German use. Here, the same (containing 180 grains powder) are often employed in working above ground, but each blast throws at least  $\frac{1}{8}$  cubic foot of solid mass. I consider it my duty not to withhold these preliminary remarks on a subject which possesses so great an importance for mining, and I can only add the wish that the mining public will accept this thing as far as possible, and will test and employ the new powder. Ammeberg, January 1, 1864.” The number of the Journal in which the foregoing article appeared was published March 6th, 1864.

Professor Henry Morton, in an affidavit on the part of

the defendants, says, that he finds in said article the following description of experiments: "The blasting experiments were conducted as follows: The powder used differs from the blasting powder ordinarily in use here, in being much finer and not round, but longish and angular. Nobel states that this powder is common Swedish gunpowder, which has the same price as (Nora blasting powder?). The improved powder was used in zinc cartridge cases, 18 millimetres in width, and in length varying from 75 to 150 and 200 millimetres. These zinc cases, which are open at one end, are filled with the ordinary gunpowder, after which so much nitro-glycerine is poured in as can find room in the interstices of the powder. The powder soaked with the oil has an increased weight of 40 per cent.?" He further says, that, in order to repeat the experiment so described, he took "a quantity of common blasting powder, such as is sold throughout the country, and, having first removed from it all dust by means of a fine sieve, passed it through a coarse sieve, so as to secure only the moderately fine grains;" that "the powder so obtained corresponded, in all respects," as he believes, "to that described in the above extract as being much finer than that ordinarily in use, and not round but angular;" that he "then selected a glass test tube about  $\frac{3}{4}$  inch in diameter, and  $4\frac{1}{2}$  inches long, this corresponding to the dimensions of the cartridge cases given in the extract, namely, 18 millimetres in width and 75 to 150 millimetres long;" that into this glass tube he "then poured 15 grammes of the fine grain blasting powder above described, and upon it poured 6 grammes of nitro-glycerine, these being the proportions of powder to nitro-glycerine mentioned in the above extract;" and that "the nitro-glycerine was rapidly absorbed by the powder, and produced an essentially dry powder, which could evidently be handled and transported with as much safety as is attainable with any similar mixture." He further says, that he "mixed together 14 parts, by weight, of charcoal, and 56 parts of nitrate of soda, both in fine powder, and to these added 30 parts, by weight, of nitro-glycerine; and that the mixture, when made,

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The Atlantic Giant Powder Company v. Parker.

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constituted an essentially dry powder, evidently capable of being handled and transported with as much safety as is attainable with any such mixture." He further says, that the proportion of nitro-glycerine to gunpowder in said two experiments is  $28\frac{5}{16}$  per cent. of the whole mixture in experiment one and 30 per cent. in experiment two; that these do not, in his opinion, differ to any practical extent; and that, in his opinion, "nothing further is required, beyond the description given by Turly, above quoted, to enable any one familiar with the manufacture of ordinary gunpowder, to make such mixtures of gunpowder and nitro-glycerine as are described in experiment two, which is the powder of the defendants."

Mr. Robert J. Howe, one of the defendants, says, in an affidavit: "It is a well-known fact, that gunpowder is more effective when exploded by percussion caps than by simple fuse. Some consumers (contractors) always use percussion caps for that purpose. For the same reason, caps are better to explode the improved blasting powder, but the improved gunpowder is largely used by some parties and exploded (without cap) by fuse alone. In such use, the gunpowder of the mixture explodes the nitro-glycerine of the mixture."

Mr. Thomas Varney, an expert for the plaintiff, testifies as follows, in an affidavit, in regard to the foregoing affidavits of Professor Morton and Mr. Howe: "I have read the affidavits of Professor Henry Morton and Robert J. Howe. I understand how Professor Morton made his mixture of nitro-glycerine and gunpowder, in imitation of that described in the report of Mr. Turly, in Dingler's Journal of 1864. I have made and further tested Dr. Morton's mixture, to ascertain whether his opinion was correct, that this mixture was a safety one—as safe as the powder made by the defendants. I find it is not. I experimented with two kinds of gunpowder. In one case I used common blasting powder. In the other I used the Laflin & Rand Orange Ducking Powder—a powder closely resembling that used by Professor Morton both in structure and size of grain. The proportions of nitro-

glycerine and gunpowder was the same in each case, and the same as Professor Morton's, to wit,  $28\frac{1}{2}$  parts, by weight, of nitro-glycerine to  $71\frac{1}{2}$  of gunpowder. I placed these mixtures upon several thicknesses of paper and allowed them to remain in a room having a temperature of  $75^{\circ}$  Fahrenheit for 45 hours, and then weighed them. I found they had lost almost two-thirds of their nitro-glycerine, the same having drained out of the mixture and became absorbed into the paper, going through ten thicknesses thereof. \* \* \* This mixture is not a safety one, nor is it dynamite," (meaning, the compound of No. 5,799,) "or the same thing as that made by the defendants. It is leaky. If it should be packed in paper cartridges, and these cartridges be packed in wooden cases, and be carried in cars, as is done with the powder made by the defendants, nitro-glycerine would drain from it and run into the springs, journals and other machinery beneath and upon the wheels and rails, as was the case with the leaky dualin at Worcester, Massachusetts, and the result would be the same as in that case—the entire cargo of powder would be exploded; whereas, the powder made by the defendants is thus packed and transported without the slightest danger of explosion from this source, because it is not leaky. The mixture in the Turly experiment was not made according to the rules of the dynamite patent," (meaning No. 5,799,) "but the defendants' powder is, to wit, so much nitro-glycerine is put in as will make the mixture an efficient explosive, and be retained without leakage, and no more. The leading rule for making the old mixture, as stated by Turly, is, that so much nitro-glycerine was poured in as could find room in the interstices of the powder. I tried this also, and found the mixture much more wet and leaky than the others above described. The reason why the old mixture was put into zinc cases instead of paper ones or directly into the bore hole, was because it was leaky and had to be treated like liquid nitro-glycerine. I have carefully studied the French patent of 1863, the English one of 1864, and the memoranda filed in the American Patent Office in 1865," (the last is a part of the contents of

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The Atlantic Giant Powder Company v. Parker.

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the file wrapper in the matter of the patent granted to Nobel, No. 50,617, October 24th, 1865, for "substitute for gunpowder," and being the original of reissues, Nos. 4,818, division D, and 4,819, division E, both dated March 19th, 1872,) "being all the evidence, except the Turly report, referred to by the defendants herein as either anticipating the dynamite invention or tending otherwise to invalidate it. My views as to the old mixtures, and some of the grounds for them, are as follows: I regard them as really merely experimental, because, in the first place, as practical things, they amounted to nothing. They did not go into practice at all. They were tried and abandoned. At this time, we are able to understand them and their value fully, and, we know they were quite worthless, except as links in the chain of experiments which led to the exploding of nitro-glycerine by detonation. If, at this day, any one should do, in all respects, what was described in the documents referred to, or what was actually done, as shown by Turly's report, he would be guilty of a great folly, but he would not infringe the dynamite patent. Nobody has ever been guilty of this folly, or ever will, except from sheer ignorance or some ulterior design. He will never adopt the old process as an economic mode of blasting. We presume this old process aided Nobel in reaching the detonating mode of exploding nitro-glycerine; but, however this may be, it has never been used except experimentally, so far as I know. Let any one be ever so deeply skilled as an expert, or ever so experienced in the practice of all that is shown by these old documents, yet he could not make the defendants' powder that is gunpowder dynamite. Furthermore, even if, by accident, in making the old mixtures, the ingredients may have been mixed in dynamite proportions, yet there is no evidence that the mixture was ever applied to the purposes and uses peculiar to dynamite. The leading purposes of dynamite are safety in transport and freedom from leakage in the bore hole. There is no accident as far as I know, either of the transport, or the old mixtures, or of their use, which in the bore hole, or in their proper cartridges. In the documents re-

THE ATLANTIC

ferred to, it appears that the old mixtures were designed for two purposes—fire-arms and blasting. If it was dynamite, or such powder as the defendants make, and was used as theirs is, to wit, detonated in a gun or cannon, the gun and cannon were blown to pieces in every instance. The defendants' powder never has been used, and never can be used, in ordnance or fire-arms. We must, therefore, conclude, that the old mixture designed for fire-arms was not dynamite, or that it was never used in fire-arms, was, therefore, never transported, and was, therefore, never put to dynamite use. As to the old blasting mixture, Turly, the only reporter on the subject, gives his account in such manner as to lead one to conclude that the mixture was made at the mine. The narrative of the process shows, that the shell of zinc was filled with gunpowder—then the nitro-glycerine poured in—then corked—then turned cork downwards and put into the bore hole, &c.—as if each step immediately followed the preceding one. The old mixtures were never used as dynamites, that is to say, the leading functions of dynamite were never involved, applied or enjoyed. Not a single life or limb, or a single dollar's worth of property, was ever saved by their use, whereas, undoubtedly, many lives and much property have been saved by the use of the defendants' powder, instead of using the nitro-glycerine contained in it in its pure state, or in the form of the old mining mixture. Mr. Howe says his powder is largely used by some parties and exploded (without caps) by fuse alone. If it be inferred from this statement, or from his calling his powder an improved gunpowder, that it is more readily explodable by fire than infusorial dynamite, or any other dynamite, such inference would be erroneous; in this respect, it is precisely like all others. The original dynamite patent," (meaning, No. 78,317,) "fully explains this subject."

In reply to the foregoing affidavit of Mr. Varney, the defendants produced the affidavit of Charles Leibshner, to show that the Swedish gunpowder mentioned by Turly must have been an uncompressed, unglazed, saltpetre powder, and that the gunpowder used by Mr. Varney, in his experiments,

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The Atlantic Giant Powder Company v. Parker.

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was a compressed and glazed powder, so that the former would be a better absorbent than the latter. The defendant Howe also makes an affidavit to the effect that unpressed powder is comparatively loose, porous and absorbent, and would readily absorb and retain 30 per cent. of nitro-glycerine, while pressed powder is hard, compact and non-absorbent; and that he believes the Swedish gunpowder of the Turly article was uncompressed, unglazed gunpowder. Professor Morton also makes an affidavit, in reply to that of Mr. Varney. He says: "I have examined what I understand to be the powders named by Mr. Varney, namely, the 'common blasting powder' used in this vicinity at present, and the 'Laflin & Rand Orange Ducking Powder,' and find them to differ in a very essential respect from the powder used by me in the experiment mentioned by me in my said previous affidavit, and from the powder which I believe to have been used in the experiments recited in the Turly extract. That is to say, these powders, used by Mr. Varney, are extremely hard and compact, and not porous, or capable of absorbing a fluid, and are, moreover, highly glazed with black lead; while, on the contrary, the powder which I employed in my experiment, and which I believe to be that described in the Turly extract, was a powder made without compression, in the manner in general use long ago, and, consequently, light, porous and eminently absorbent. I repeated the experiments with these powders as described by Mr. Varney, and found that, when they were mixed with nitro-glycerine in the proportions named, they produced by no means dry powders, but, on the contrary, refusing to absorb the nitro-glycerine, the grains of powder were simply drenched on the outside with nitro-glycerine, which ran from them into the vessel in which they were mixed, or drained from them into the paper on which I spread a portion. This was true of both the common blasting powder and of the orange ducking powder." He further makes statements to show that a powder made and sold by the plaintiff, and called "giant powder, No. 2," permitted nitro-glycerine to leak from it "in a very marked

manner, equal in degree to the leakage of the nitro-glycerine from the Turly mixture" made by him, though "not nearly so much as the leakage of nitro-glycerine from the mixtures described in the Varney affidavit," and made up by him "in accordance with the directions of the same;" that a mixture of nitro-glycerine and the best English rotten stone, pulverized to a very fine powder, like flour, in the proportions of 40 per cent. of rotten stone to 60 per cent. of nitro-glycerine, produced a semi-fluid paste; and that a mixture of 78 per cent. of nitro-glycerine with 22 per cent. of infusorial earth, of low specific gravity and great absorbent capacity, furnished to him by the plaintiff, as a specimen of the best absorbent substance of that character, produced a pasty mixture, which drained to a greater extent than did the Turly mixture; and that samples of the two powders used by Mr. Varney in his experiments, showed both of them to be compressed, hard and non-absorbent, and glazed with black lead, and corresponded, in all those respects, with the powders with which he made his said repetitions of Mr. Varney's experiments.

To those affidavits the plaintiff replies by several affidavits. There is an affidavit of T. P. Shaffner, setting forth, that, during the year 1864, he was engaged by the Swedish government, at Stockholm, in experimenting with explosives, and was well acquainted with the powder mentioned in the Turly article as being used in the experiments of Nobel, and knows that that powder was compressed and was very hard; that, although he has been acquainted with different kinds of powder, both in this country and in foreign countries, from long before 1864 down to the present time, the powder referred to in said article as having been used in the experiments of Nobel was the hardest powder he ever handled, and was, also, a highly glazed powder; that it was much harder than any blasting powder he has ever known; that Turly, in said article, says: "After the cartridge is filled with powder and oil, it is tightly closed with a stopper of cork, twenty millimetres long. It will be better to solder the cartridge;" and that it is perfectly clear to his mind, that

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The Atlantic Giant Powder Company v. Parker.

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the use of the cork stopper ("tightly closed") and of the solder, was to keep the nitro-glycerine from leaking out, for, the article says, that "as much nitro-glycerine is poured upon it as can find room in the interstices of the powder." There is also an affidavit of John Schrader, to the effect, that he poured upon some medium sized grains of powder in a vial, as much nitro-glycerine, at about 70° Fahrenheit, as could find room in the interstices of the powder; that the powder became saturated in about three minutes; that the powder was represented as the kind used many years ago, being made in stamp mills, and not either pressed or glazed; and that it is very soft and absorbent, but, like all absorbents, when

- saturated with nitro-glycerine in the manner above described, the mixture is leaky, and is substantially as dangerous for handling and transport as pure nitro-glycerine. There is also an affidavit of Alfred Mordecai, the author of "Report of Experiments made at Washington Arsenal, in 1843 and 1844," published in 1845. He states, that the experiments described in that Report were made, and the Report was printed, under his immediate superintendence; that the powder therein mentioned as Swedish musket powder was part of a sample of gunpowder brought from Sweden in 1840, by a commission of officers of the ordnance department of the United States, of whom he was one; that the powder is mentioned in the report of the commission as "a sample of gunpowder from the royal manufactory;" that it was contained in a sealed glass bottle; and that it is correctly described in said "Report of Experiments" as "musket powder, glazed, grain very hard, fracture slaty." It is also shown, by various European books, that powder is described, in 1842, as being pressed in a hydraulic or screw press, and smoothed or polished, to make it dense, and to take off its rough surface, splintering edges and corners, and to make angular powder round; that powder is described, in 1850, as being submitted to a pressure of about 75 tons to a superficial foot, and made hard, and then glazed, with the result of giving an equal degree of density to the grains, and a polish to their surface, and rendering the

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The Atlantic Giant Powder Company v. Parker.

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powder less susceptible of absorbing moisture ; and that it is described, from 1807 to 1861, as being pressed and glazed.

To such affidavits the defendants reply. Carll Dittmar says, that the powder generally used for all purposes, on the Continent of Europe, in 1864 and 1865, was loose, porous and absorbent in character, capable of absorbing 30 per cent. of nitro-glycerine, more or less ; that, as a general thing, no hydraulic or screw presses were used in the manufacture of gunpowder, on the Continent of Europe, prior to 1865, nor up to 1869 ; that the structure of the powders made in this country, at the present day, which have been subjected to the pressure of powerful hydraulic or screw presses, is essentially different from that made with the stamp mills and without pressure, the former being hard, compact, and slow of absorption, and the latter light, porous, and readily absorbent ; and that he has no doubt that the powder alluded to in the Turly article as "common Swedish gunpowder" was a loose, porous, absorbent powder, uncompressed, and that the nitro-glycerine, used in the proportions cited by Turly, was all taken up by the powder and was held by the same, and that the resulting compound was a dry powder, safe to be handled, transported and used. Carl W. Volney says, that all Swedish and German powders that were commonly used in those countries prior to and during 1864, and for some years afterwards, were what is known as stamp mill powder, unglazed and unpressed. The defendant Parker states, that hard grained unpressed powder absorbs and retains, as a comparatively dry powder, safe to transport, handle and use, 30 *per cent.* of nitro-glycerine.

The Turly article starts out with stating, that what Nobel had invented and patented before January 1st, 1864, was an improvement which made ordinary powder, for blasting and shooting, considerably stronger by adding to it nitro-glycerine. This evidently refers to Nobel's specifications of September, 1863, in the English and French patents to Nobel, referred to in the Rand case ; and the article of Turly alludes to no other feature of the compound made of nitro-glycerine

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The Atlantic Giant Powder Company v. Parker.

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and gunpowder, except that it is stronger in its effects, when exploded, than ordinary powder. The only place in the Turly article where any suggestion is made as to the percentage, in weight, of the added nitro-glycerine, is in the account of the blasting experiments. The description manifestly is narrating an experiment where the cartridge is filled with the two substances at the bore hole and then immediately used. There is no suggestion of a resulting dry powder, capable of transportation, or of any thing but a wet mixture, in a vessel which is to be tightly corked, because it would otherwise allow the nitro-glycerine to leak out, when it is turned with the cork downward, in which position it is inserted in the bore hole. The cartridge is then imbedded in gunpowder in the bore hole, and the gunpowder is fired by a fuse. The description is entirely insufficient as an anticipation of Nobel's invention. All the speculation indulged in as to what the Swedish cannon powder was, and all the experiments to show that a powder which is assumed to be what that was, will, with the addition of the indicated proportion of nitro glycerine, make a dry compound, amount to nothing, in the face of the fact, that the article does not suggest that the blasting compound was a dry powder, or a safety powder, or such a compound as the patent sued on describes. The prior description, to invalidate the patent, must be such as to show that the article described in the patent can be certainly arrived at by following the prior description; and it is not enough to show, that, by the lucky accident of taking gunpowder of the proper quality, a compound may be obtained which is unlike that indicated by such description. By the light of what Nobel has taught in the patent sued on, much can now be asserted to be seen in what was published before, which no one ever, in fact, saw in it before the original of the patent sued on was taken out. There is no evidence that any one, from the Turly article, or by any method supposed to be described in it, made, before the invention in question, as patented by Nobel, in the original of the patent sued on, was made by him, the safety powder which constitutes that

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The Oceanic Steam Navigation Company v. Tappan.

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invention. So far from this, the Turly article starts out with the assertion, that a mass of liquid nitro-glycerine is quite harmless in and of itself, and that its employment has no greater danger than that of common powder.

The memoranda referred to by Mr. Varney, in his affidavit, show, in common with the English and French patents to which he refers, nothing more than attempts by Nobel to mix gunpowder with nitro-glycerine, and then to burn the nitro-glycerine by igniting the gunpowder. After that, he discovered that nitro-glycerine could be exploded in a mass, under given conditions, by detonation, and then its liability to accidental explosion in mass by concussion in handling and transportation was observed, and then followed the invention we are considering.

In every view the case for the plaintiff is such as to warrant the granting of a preliminary injunction, in this case, and the denial of the motion to vacate the injunction against the Neptune Powder Company.

*George Gifford and Causten Browne*, for the plaintiff.

*Charles F. Blake*, for the defendants.

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THE OCEANIC STEAM NAVIGATION COMPANY

vs.

J. NELSON TAPPAN.

T., as Chamberlain of the city of New York, collected from a corporation moneys which it paid under protest, as a passenger tax, under Acts of the Legislature of the State of New York, which the Supreme Court of the United States held to be unconstitutional and void. Afterwards, Congress passed an Act, (*Act of June 19th, 1878, 20 U. S. Stat. at Large, 177,*) validating the collection of the moneys and declaring that no action should lie to

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The Oceanic Steam Navigation Company v. Tappan.

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recover them back. The moneys paid were paid to relieve the corporation from an accumulation of penalties, the collection of which could be enforced only by judicial proceedings. In a suit by the corporation against the Chamberlain, to recover back the moneys: *Held*, that the payments were voluntarily made and could not be recovered back, although paid under protest. Whether such validating Act of Congress is valid, *quære*.

(Before WALLACE, J., Southern District of New York, May 6th, 1879.)

WALLACE, J. This action is brought to recover moneys alleged to have been illegally exacted by the defendant, the Chamberlain of the city of New York, and to whom the plaintiff paid the sum involved, under protest. The moneys were collected by the defendant under color of the provisions of Acts of the Legislature of the State of New York, by which, in effect, a tax was imposed upon alien passengers arriving in vessels at the port of New York, to be collected of the master or owner of the ship by which they were landed. These Acts, since the payment of the moneys in suit, have been declared unconstitutional by the Supreme Court of the United States, as in conflict with the clause of the Constitution of the United States which delegates to Congress the right to regulate commerce with foreign nations. (*Henderson v. The Mayor*, 92 U. S., 259.) Since the payment of the moneys, however, Congress has passed an Act, (*Act of June 19th, 1878, 20 U. S. Stat. at Large, 177,*) which declares that the acts of every State and municipal officer or corporation of the several States, in the collection of these moneys, shall be valid, and that no action shall be maintained against such officer or corporation, for the recovery of such moneys. The defence of the action is placed upon two grounds—first, that the moneys were paid voluntarily; and, second, that the validating Act of Congress precludes a recovery by the plaintiff.

An action does not lie to recover back moneys claimed without right, if the payment was made voluntarily, and with a full knowledge of the facts upon which the claim was predicated. It is not enough that payment was made under protest by the party paying. The payment must have been com-

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The Oceanic Steam Navigation Company v. Tappan.

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pulsory; that is, it must have been made under coercion, actual or legal, in order to authorize the party paying to recover it back. In the absence of such coercion, the person of whom the payment is demanded must refuse the demand; and he will not be permitted, with knowledge that the claim is illegal and unwarranted, to make payment without resistance, where resistance is lawful and possible, and afterwards to select his own time to bring an action for restoration, when, possibly, his adversary has lost the evidence to sustain the claim. Where, however, the demandant is in a position to seize or detain the property of him against whom the claim is made, without a resort to judicial proceedings, in which the validity of the claim may be contested, and payment is made under protest, to release the property from such seizure or detention, the party paying can recover back his payment.

The commutation moneys paid by the plaintiff were paid to relieve the plaintiff from an accumulation of penalties, the collection of which could only be enforced by judicial proceedings. The statute required the plaintiff, within twenty-four hours after the arrival of its vessel at the port of New York, to report in writing to the Mayor of the city, the number, names, places of birth and last legal residence, of each alien passenger, and, in case of failure, imposed a penalty of seventy-five dollars for each passenger not reported. The statute also directed the Mayor, by an endorsement to be made on such report, to require the owner of the vessel to execute a several bond, with sureties, in a penalty of \$300, for each passenger included in the report, to indemnify and save harmless the Commissioners of Emigration, and each and every city, town or county in the State, against all expenses which might necessarily be incurred for the care and support of such passenger. The statute also enacted, that such owner might commute for the bonds so required, within three days after the landing of such passengers, by paying to the Chamberlain of the city of New York the sum of one dollar and fifty cents for each and every passenger reported according to law, and that the receipt of such sum should be deemed a

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The Oceanic Steam Navigation Company v. Tappan.

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full and sufficient discharge from the requirements of giving bond. In case of neglect or refusal to give the bonds required, within twenty-four hours after landing passengers, the statute imposed a penalty upon the owner or consignee of the vessel, of five hundred dollars for each passenger landed.

The penalties given by the Act were to be sued for and recovered by the Commissioners of Emigration, in any Court having jurisdiction of such actions, and, under a general statute of the State respecting claims against vessels, such an action could be commenced by the seizure of the vessel by attachment, upon giving security to indemnify the owner. Briefly stated, the plaintiff's position was this—if it failed to report, it was liable to a penalty of seventy-five dollars for each alien passenger; if it did report, it was required to pay one dollar and fifty cents for each passenger, by way of commutation, or was liable, if required by the Mayor, to give onerous bonds, and, in default, to pay a penalty of five hundred dollars for each bond withheld; and the penalties, in either case, were a lien upon the vessel, collectible by an action at law, wherein, upon giving security for the indemnity of the vessel owner, an attachment against the vessel might be obtained and the vessel seized.

Palpably, the statute was framed to coerce the payment of the commutation moneys. If they were not paid, the owner of the vessel was made liable to an accumulation of penalties, which would aggregate an enormous sum, and which, if collected, would ordinarily bankrupt the ship-owner. Naturally, rather than incur the hazard of such disastrous consequences, the ship-owner would pay, in preference to abiding the contingencies of litigation. The hardship of the particular case, however, cannot change the rule of law. The penalties imposed in lieu of the commutation money could only be collected by suit in a Court of law, where the corporation against which they were claimed could have its day and all the protection which the Courts afford to suitors; and a payment made under such a state of facts is not made under legal coercion. The party paying is bound to know

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The Oceanic Steam Navigation Company v. Tappan.

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the law and to assume that it will be correctly administered by the tribunal which is to decide the controversy. The rule is well stated in *Benson v. Monroe*, (7 *Cush.*, 125,) which was a case to recover head money, under a statute similar to the one here, and was precisely like the present case, except that attachment had been obtained, and the vessel seized under them, to recover the penalties. The plaintiffs thereupon paid the commutation money under protest, and brought suit to recover it back; and the Court said: "They should have contested the demand made on them, in the suit that was instituted against them, and, having voluntarily adjusted that demand, and relieved their vessel from seizure, with a full knowledge, or means of knowledge, of all the facts of their case, they cannot now be permitted to disturb that adjustment."

It is stated, in general terms, in some of the decisions, that, where money is paid to a public officer, upon an unlawful demand, to save the person paying from the infliction, under color of authority, of great or irreparable injury, from which he can only be saved by making the payment, such payment is made under an urgent and immediate necessity and may be recovered back. But, it will be found that none of these decisions were in cases where the injury apprehended by the party paying could only be inflicted by the decision of a Court in favor of the validity of the claim made against him. There cannot be an immediate and urgent necessity for the payment of a demand which can only be enforced by the decision of a Court of justice. The case of *Benson v. Monroe*, and that of *Cunningham v. Boston*, (16 *Gray*, 468,) are directly in point, as deciding, that the apprehension of the recovery of heavy penalties by suit, in case the demand for a small sum is not complied with, does not take the case out of the general rule.

The case of *Cunningham v. Monroe*, (15 *Gray*, 471,) cited for the plaintiff, was one where the payment was made under circumstances amounting to duress *de facto*, which were emphasized, in the opinion of the Court, as distinguishing it

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The Oceanic Steam Navigation Company v. Tappan.

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from *Cunningham v. Boston*. There are cases in the books, where payments have been extorted by threats of criminal or civil proceedings, and the party paying the demand has been permitted to recover back, but these were cases where the facts were held to constitute actual duress, of which the threats were an incident.

In reaching this conclusion I have not adverted to the fact, that the Mayor never required the bonds to be executed by the plaintiff, by the endorsement upon the reports, which the statute directs. The moneys were paid by the plaintiff to escape the penalties imposed for neglect to execute the bonds, and not the penalties for failing to make the report required by the Act. Until the Mayor's endorsement these penalties could not accrue. The plaintiff, without waiting to ascertain whether or not the Mayor would take the action required to subject the plaintiff to the penalties, paid the commutation moneys, upon the assumption that the Mayor would take such action at some future time. Within the recent decision of the Supreme Court of the United States in *Railroad Co. v. Commissioners*, (98 U. S., 541,) this circumstance should defeat the plaintiff. That case holds, that, where a warrant was in the hands of an officer, for the collection of a tax, which authorized him to seize the property of the plaintiff, and no actual attempt to execute the warrant had been made, but the plaintiff, assuming that a seizure would be made, went to the treasurer and paid the tax under protest, setting forth in the protest the illegality of the tax, and stating that a suit would be brought to recover back the payment, the payment was not compulsory, in a legal sense, and could not, therefore, be recovered back.

I have preferred, however, to rest the decision, upon this branch of the case, upon the broad ground, that money paid upon a demand, to prevent the seizure of property which can only take place by judicial proceedings, where the party paying may have his day in Court and defeat the proceeding, is not paid under legal compulsion, and cannot be recovered back, although paid under protest. (*Mayor of Baltimore v.*

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The Oceanic Steam Navigation Company v. Tappan.

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*Lefferman*, 4 *Gill*, 425; *Town Council of Cahaba v. Burnett*, 34 *Ala.*, 400; *Cook v. City of Boston*, 9 *Allen*, 393; *Taylor v. Board of Health*, 31 *Penn. St. Rep.*, 73; *Mays v. Cincinnati*, 1 *Ohio St. Rep.*, 268.)

Having thus reached a conclusion which must dispose of this case adversely to the plaintiff, it is not necessary to pass upon the question presented by the defence, which rests on the effect of the Act of Congress declaring that the acts of the defendant in collecting the moneys in suit shall be valid, and declaring that no action shall be maintained to recover back the money. It would be indecorous to adjudge an Act of Congress unconstitutional, when it is not necessary to do so, in the disposition of the controversy before the Court. It is proper, however, to say, that, to sustain the validity of this Act, it will be necessary to decide that it is within the authority of Congress to legalize the action of officers of a State in collecting moneys under a law of the State, which, because it was unconstitutional, conferred no authority whatever to act under it; and I am not aware of any legislative validating Act containing such a vigorous and radical measure of relief, which has been the subject of judicial exposition. Unless the Act can be sustained as a validating Act, it would seem that the clause which declares that no action shall be maintained to recover back the moneys collected, must be ineffectual, because it would deprive the plaintiff of a right of action, which is a vested right of property, without due process of law.

Judgment is ordered for the defendant.

*Henry Nicoll, Ashbel Green and James Emott*, for the plaintiff.

*George P. Andrews, William C. Whitney and Lewis Sanders*, for the defendant.

## WILLIAM GARDNER AND OTHERS

vs.

## MARTIN HERZ AND JOHN K. MAYO. IN EQUITY.

The reissued letters patent granted to George Gardner, William Gardner and Jane E. Gardner, July 4th, 1876, for an "improvement in chair seats," (the original patent having been granted to George Gardner and Gardner & Gardner, May 21st, 1872, on the invention of George Gardner,) are void.

The invention consisted in constructing chair seats of two or more veneers of wood, with the grains crossing each other, the veneers being glued together by an adhesive substance, and in perforating the seat with holes, for ventilation and ornament.

All except the perforations is described in letters patent granted to John K. Mayo, December 26th, 1865, for "improved material for roofing, tubing, tank, wainscoting, boats, and other structures," and in Division E of the reissue of that patent, granted August 18th, 1868.

As to the perforations, the invention was not patentable, because sheet metal seats of chairs had before been perforated, also india rubber and gutta percha seats for chairs.

(Before BLATCHFORD, J., Southern District of New York, May 9th, 1879.)

BLATCHFORD, J. This is a motion for a preliminary injunction, founded on reissued letters patent granted to George Gardner, William Gardner and Jane E. Gardner, July 4th, 1876, for an "improvement in chair seats," the original patent having been granted to George Gardner and Gardner & Gardner, May 21st, 1872, on the invention of George Gardner. The specification of the reissue states, that the "invention relates to bottoms for seats, and consists in constructing the said seats of two or more veneers of wood, with the grains crossing each other, the said veneers of wood being glued together by an adhesive substance;" that "veneers, when thus arranged, that is to say, with the grains crossing each other, or diversified, will make a seat which, for durability and economy, will be found to be a very useful improve-

ment;" that the seat may be made "either solid or perforated;" that "the perforated seats are made by boring a round hole, of any design desired;" that "the perforated seats are desirable, as they are ventilated and ornamental;" that "the veneers, with the grains crossed or diversified and glued together, become homogeneous, thus making a solid piece of wood," from which the bottom of the seat is made, "which, when perforated and varnished, is ready for the market;" that "veneers, when thus arranged, that is to say, with the grain running crosswise or in diverse directions, will make a bottom for a seat, which, for economy and durability, will be found to be a very useful improvement;" and that "the bottoms thus made may be left solid, or perforated after some design agreeable to the fancy of the one having them made." The specification also states, that a slight concave configuration may be given to the seat, to add to the comfort of the party using it; and that the bottom thus made is secured to a frame, which surrounds it, and, through the latter, is secured to the frame of the seat. The claims are six in number: 1. As a new article of manufacture, a bottom for a seat, constructed of two or more veneers or thin layers of wood, with the grain of the one layer crossing that of the other, and the whole secured together with an adhesive substance, substantially as set forth. 2. As a new article of manufacture, a bottom for a seat frame, constructed of two or more veneers or thin layers of wood, with the grain of the one layer crossing that of the other, said layers being secured together by an adhesive substance, and having perforations formed therein for the purpose of ventilation or ornamentation, substantially as set forth. 3. The combination of a seat bottom, constructed of two or more veneers or thin layers of wood, with the grain of the one layer crossing that of the other, and the whole secured together by an adhesive substance, with the frame of the seat, substantially as set forth. 4. The combination of a seat bottom, constructed of two or more veneers or thin layers of wood, the grain of the one layer crossing that of the other, and the whole secured together by an adhesive sub-

stance, and provided with perforations for the purpose of ventilation or ornamentation, with the frame of a seat, substantially as set forth. 5. As a new article of manufacture, a wooden bottom for seats, provided with perforations for the purpose of ventilation or ornamentation. 6. As a new article of manufacture, a seat bottom constructed of two or more veneers or thin layers of wood, the grain of the one layer crossing that of the other, and secured together by an adhesive substance, said bottom thus formed having a curved or concave configuration on its upper side, substantially as set forth." The defendants make seat bottoms constructed of two or more veneers or thin layers of wood, with the grain of the one layer crossing that of the other, and the whole secured together with an adhesive substance; and there are slots or slits cut through the seat, as long as the length of the seat bottom from front to rear, leaving longitudinal holes of that length, and thus forming ribs or slats, the effect of which is to make the seat bottom yielding and elastic.

A patent was granted to the defendant Mayo, December 26th, 1865, for "improved material for roofing, tubing, tank, wainscotting, boats and other structures." The specification of that patent states, that the invention is an "improvement in the manufacture of material for structures generally." The specification says: "The scale used in the ensuing description consists of a thin layer of wood cut from a board or log and forming a veneer. My invention consists in cementing together a number of these scales or veneers, with the grain of the successive pieces running crosswise or diversely. A number of these scale boards, their surfaces having been previously treated with cement or analogous materials, are so laid together as to cross the grain of the respective pieces, so as to form a firm material for the construction of houses, boats, ships, tanks, floors, pipes, drains, sewers, packing cases, boxes, barrels, sidewalks, cans, pails, tubs, firkins, measures, cheese boxes, trunks, valises, dry docks, canal locks, mill and factory flumes, masts, spars, outside covering and inside finish of houses, stores, shops, depots and warehouses, fences, cover-

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Gardner v. Herz.

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ing of piles, railroad cars, railroad and suspension bridges, railroad tracks and sleepers, wagons, carriages and carts, bedsteads, sacking, mattresses and covering of beds, sofas and sofa bedsteads, divans, lounges, chairs and settees. In house architecture, the weather boarding and inside finish of the house may consist of this material, and in vessels of every kind it may be made the covering or lining of the ribs or skeleton, or, in some instances, may form the body of the articles, as, for instance, in pipes, in which the layers are united by an impervious cement, and so applied to each other that the grain of one will be lengthwise of the pipe, of another will be at the right angles to the former, and, if others are added, may be spirally around it. By the well-known processes of wet and dry heating, such a pliability may be given to the layers as to permit them to readily assume various figures, or be laid upon irregular objects, with the grain of the respective pieces running diversely, so as to prevent splitting. I cannot pretend to anticipate all the various uses to which this scale board may be applied, but, suffice it to say, that, by the means employed, I am enabled to make a very strong and light structure, of whatever shape it may be, or for whatever purpose it may be designed. It is capable of being made an effective and elegant substitute for the usual covering of the walls of rooms. For flooring it is also available, especially in cases where it is an object to make apartments air-tight, as in ice-houses, fruit chambers and other rooms which it is desired to isolate for any purpose." The claim of the patent is: "The application of scale boards or veneers in layers, the direction of whose grain is crossed or diversified, and which are connected together, forming a material for the construction, lining or covering of land and marine structures." This patent was reissued August 18th, 1868, in eight divisions, on eight separate amended specifications, to John K. Mayo, Andre Cushing and G. B. Cushing. Division E is a reissue for an "improvement in house decorations, furniture, fittings and the like." The specification says: "The invention consists in constructing various house

decorations, furnishings and fittings of a plurality of scale boards or thin sheets or veneers of wood, cemented or otherwise firmly connected together, with the several scales or thicknesses so placed that the joints (ends or edges) shall be broken by each alternate layer, and the grain of the wood crossed or diversified, so that they will afford to each other mutual strength, support and protection against checking, splitting, swelling or shrinking. \* \* \* In the chair, fig. 2, the bottom, B, may be formed of a flexible material, made up by the union of two or more thin layers of wood, having the grain crossed or diversified in direction, and united by suitable cement." Various other articles of house decoration, fitting and furnishing are specified, to the construction of which the invention is stated to be applicable. The claim is: "The employment or use of the compound scale board hereinbefore described, in the formation of the specified or analogous structures or articles of house decoration, fitting and furnishing."

What is claimed in the first claim of the Gardner reissued patent is clearly described in the two Mayo patents; both of which were issued prior to the original Gardner patent. The original Gardner patent claimed, "as a new article of manufacture, a chair seat constructed of veneers of wood with the grain running crosswise of each other, and glued together, all substantially as set forth, and for the purposes specified." The specification stated, that "the seats may be left solid, or perforated after some design agreeable to the fancy of the one having them made," but there was no claim in respect of any perforations. On what ground the Patent Office granted the claim of the original Gardner patent, or the first claim of the reissued Gardner patent, in view of the original and reissued Mayo patents, it is impossible to conjecture. The only conclusion can be that the Mayo patents were twice overlooked.

The next subject is the perforations. A reissued patent was granted to Isaac P. Tice, as assignee of Austin S. Smith, the inventor, June 27th, 1865, for an "improved chair bot-

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Gardner v. Herz.

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tom or back," the original patent having been granted to said Smith, May 25th, 1858. The specification of the reissue describes the making of the bottoms or seats of chairs of perforated sheet metal, and attaching the edges of the sheet of perforated metal to a supporting frame of wood or other stiff material of suitable form, by nails, tacks or other suitable fastenings. It states that the perforations may be of any suitable form, as circular or of a form resembling the reticulations produced by interlacing the strips of cane in a cane bottom; that the sheet metal is not only as good as cane in coolness and in the ventilation it affords to the clothing of persons, but is cheaper and more durable and so much smoother as to be less destructive to wearing apparel. A patent was granted to J. W. Cochran, May 22d, 1866, for a "chair, sofa and car seat." The specification states that the "invention consists in the employment of india rubber or gutta percha enamelled in whole or perforated (open worked) sheets for the seats and backs of chairs, sofas, car seats, carriages and lining thereof and for mattresses;" and that "the material may be attached either by lacing, gluing, cementing, screwing or nailing." The drawing shows a chair seat with circular perforations in it. A chair seat of perforated sheet metal, or perforated enamelled india rubber or gutta percha, has every feature of ventilation and ornamentation, as resulting from the perforations, that the perforated chair seat of the Gardner patent has. The perforations in the Gardner seat are not described as serving any other end than ventilation and ornamentation. In view of the prior perforated seats there was no patentable novelty in perforating a wooden bottom. No claim is made that the defendants have infringed the sixth claim of the Gardner reissue. As to the first five claims there is nothing new or patentable in them, in view of the above references.

The motion is, therefore, denied.

*Andrew J. Todd*, for the plaintiff.

*Frost & Coe*, for the defendants.

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McLean v. The St. Paul and Chicago Railway Company.

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SAMUEL McLEAN

vs.

THE ST. PAUL AND CHICAGO RAILWAY COMPANY.

Under §§ 2 and 3 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470, 471,) a suit may be removed into this Court from a State Court, on a petition by the defendant, averring that the defendant is a corporation created by, and a citizen of, one State, and that the plaintiff is a citizen of another State, without averring that the plaintiff was, at the time of the commencement of the suit, a citizen of a different State from the defendant.

The defendant in a suit, after taking steps to remove it into this Court, did not file in this Court a copy of the record of the suit until three days after the day named in the removal bond as the day on which the copy of the record was to be filed. The case was not within the exceptions provided for in § 7 of the said Act. The plaintiff had not waived the delay, and the defendant offered no excuse except an allegation that the non-filing on the proper day was an inadvertence. The plaintiff moved to remand the cause: *Held*, that the motion must be granted.

(Before BLATCHFORD, J., Southern District of New York, May 14th, 1879.)

BLATCHFORD, J. On the 7th of February, 1879, this suit was commenced in the Court of Common Pleas for the city and county of New York, by the service of a summons. A complaint was afterwards put in in the State Court, which demands judgment against the defendant for \$105,000 and interest, for breach of a contract. The complaint, which is sworn to February 27th, 1879, sets forth that the plaintiff "is a resident of the city of Brooklyn, county of Kings and State of New York." The defendant is a corporation created by the State of Minnesota. On the 17th of March, 1879, the State Court made an order in the cause, in these words: "It appearing by the complaint in this action, that the defendant, the St. Paul and Chicago Railway Company, is a corporation created under and by virtue of the laws of the State of Minnesota, and that the plaintiff is a resident of the State

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McLean v. The St. Paul and Chicago Railway Company.

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of New York, and the said defendant having, before the term at which this cause could be first tried in this Court, made and filed a petition in this suit, in this Court, whereby it appears that the plaintiff in this action is a citizen of the State of New York, and that the defendant is a citizen of the State of Minnesota, and that, pursuant to the second and third sections of the Act of the Congress of the United States, approved March 3d, 1875, this being an action between citizens of different States, and the matter in dispute, exclusive of costs, exceeds the sum of value of \$500, the defendant having prayed for the removal of this suit into the Circuit Court of the United States for the Southern District of New York, and having made and filed with the said petition a bond, with good and sufficient surety, for the defendant entering in said Circuit Court, on the first day of its next session, a copy of the record of such suit in this Court, and for paying all costs that may be awarded by the said Circuit Court of the United States, if the said Court shall hold that this suit was wrongfully or improperly removed thereto, and also for the appearing and entering special bail in such suit, if special bail was originally requisite therein, now, on reading and filing a copy of the pleadings in said action in this Court, and the said petition and bond and proof of service of a copy thereof, and of notice of application for this order, on the attorney for the plaintiff, and on motion of Mr. C. W. Bangs, attorney for the defendant in this action, no one appearing to oppose, it is ordered, that the said petition and bond be accepted and filed, and that this Court will proceed no further in this suit, and it is hereby declared that the said suit is removed to the said Circuit Court of the United States for the Southern District of New York." The petition to the State Court is dated March 3d, 1879, and sworn to the next day. It sets forth, that the defendant "is, and is alleged in the complaint to be, a corporation created and existing under and by virtue of the laws of the State of Minnesota, and that it is alleged in the complaint that the plaintiff is a resident of the city of Brooklyn, county of Kings and State of New York, and the plaintiff

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**McLean v. The St. Paul and Chicago Railway Company.**

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is, as your petitioner is informed and believes, a citizen of the State of New York, and the defendant corporation is a citizen of the State of Minnesota." The bond referred to in said order contains this recital: "Whereas the said Samuel McLean, a citizen of the State of New York, has commenced an action in the Court of Common Pleas for the city and county of New York, against the St. Paul and Chicago Railway Company, a citizen of the State of Minnesota, \* \* \* and the said action involves a controversy between citizens of different States."

The first day of the next session of this Court after the 17th of March, 1879, was the 7th of April, 1879. The defendant did not file a copy of the record in the suit in this Court on the 7th of April, nor did it enter an appearance in this Court in this suit on the 7th of April, nor until the 10th of April, on which latter day it did file in this Court a copy of such record, and enter its appearance in this suit in this Court, and enter a rule in this Court that this action proceed in this Court as if originally commenced therein, of which notice was given to the plaintiff's attorney on the 10th of April.

The plaintiff now moves this Court to remand this cause to the State Court, on two grounds: (1.) Because the proceedings for the removal do not show that, at the commencement of the suit, the plaintiff was a citizen of the State of New York, but only show that the plaintiff was a citizen of the State of New York at the time the defendant applied to remove the cause; (2.) Because the record was not filed in this Court until the 10th of April.

In *Insurance Co. v. Pechner*, (5 Otto, 183,) a petition for removal on the ground of citizenship was presented to the State Court under § 12 of the Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 79,) which provided, that, "if a suit be commenced in any State Court," "by a citizen of the State in which the suit is brought, against a citizen of another State," "and the defendant shall, at the time of entering his appearance in such State Court, file a petition for the removal of

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McLean v. The St. Paul and Chicago Railway Company.

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the cause for trial into the next Circuit Court," "it shall then be the duty of the State Court to" "proceed no further in the cause." The petition was dated ten days after the suit was commenced, and was sworn to the next day after its date, and it was presented to the State Court at the time the appearance of the defendant was entered in that Court. The statement of the petition as to the citizenship of the plaintiff was, that the plaintiff "is a citizen of the State of New York." The State Court denied the application for removal. The plaintiff had a judgment. The case went to the Court of Appeals of New York, which held, (*Pechner v. Phoenix Ins. Co.*, 65 N. Y., 195,) that the State Court had a right to proceed with the cause, because the petition for removal did not show that the plaintiff was a citizen of the State of New York when the suit was commenced. The case was then taken to the Supreme Court of the United States. That Court held that § 12 of the Act of 1789, in the language above quoted, had reference to the citizenship of the parties when the suit was begun. It added: "The phraseology employed in the Acts of 1866, 14 Stat., 307, 1867, Id., 558, and 1875, 18 Id., 470, and in the Revised Statutes, sect. 639, is somewhat different, and we are not now called upon to give a construction to the language there used. As to the Act of 1789, we entertain no doubt in this particular. This right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record in the cause. It should state facts which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the Court that it cannot 'proceed further with the cause.' Having once acquired jurisdiction, the Court may proceed until it is judicially informed that its power over the cause has been suspended. It remains only to apply this rule to the facts as they appear in this record. The suit was commenced June 1, 1867. At that time there was nothing in the pleadings or process to indicate the citi-

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McLean v. The St. Paul and Chicago Railway Company.

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zenship of the plaintiff. The defendant, in its petition for removal, bearing date June 11, simply stated that the plaintiff is—that is to say, was at that date—a citizen of New York. This, certainly, is not stating affirmatively that such was his citizenship when the suit was commenced. The Court had the right to take the case as made by the party himself, and not inquire further. If that was not sufficient to oust the jurisdiction, there was no reason why the Court might not proceed with the cause. We think, therefore, that the Court of Appeals did not err in its decision.”

As there was nothing before the State Court in this case, and there is nothing before this Court, to show that the plaintiff was a citizen of the State of New York when this suit was commenced, it follows that this Court would have no jurisdiction of this suit if the removal were sought under a statute worded as is § 12 of the Judiciary Act of 1789. But the order of removal shows that the State Court regarded the case as one of removal under §§ 2 and 3 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470. 471.) Section 2 of that Act provides, “that any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State Court, \* \* \* in which there shall be a controversy between citizens of different States, \* \* \* either party may remove said suit into the Circuit Court of the United States for the proper District.” Section 3 of that Act provides, “that, whenever either party \* \* \* entitled to remove any suit mentioned in the next preceding section shall desire to remove such suit from a State Court to the Circuit Court of the United States, he or they may make and file a petition in such suit in such State Court, \* \* \* for the removal of such suit into the Circuit Court to be held in the District where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court on the first day of its then next session, a copy of the record in such suit, \* \* \* and also for there appearing \* \* \* in such suit, \* \* \* it shall then be the duty of the State Court to accept said pe-

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McLean v. The St. Paul and Chicago Railway Company.

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tion and bond and proceed no further in such suit \* \* \* ; and, the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court."

The defendant contends, that, under the Act of 1875, it is not necessary, in order to a removal in the present case, that it should appear that the parties were citizens of different States when the suit was commenced.

The Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 558,) provided, "that, where a suit is now pending or may hereafter be brought in any State Court, in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, \* \* \* such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such Court an affidavit stating \* \* \* may, at any time before the final hearing or trial of the suit, file a petition in such State Court for the removal of the suit into the next Circuit Court of the United States to be held in the District where the suit is pending, and offer good and sufficient surety \* \* \* ; and it shall be thereupon the duty of the State Court to accept the surety and proceed no further in the suit."

In *Johnson v. Monell*, (1 *Woolworth*, 390,) the plaintiff, being a citizen of Iowa, brought a suit in a State Court of Nebraska against a citizen of Nebraska. During the pendency of the suit the plaintiff became a citizen of Nebraska, and the suit was tried in the State Court while both of the parties were citizens of Nebraska. The plaintiff had a verdict. A new trial was granted on the application of the defendant. The plaintiff, having again, and voluntarily, become a citizen of Iowa, then petitioned, under the Act of 1867, for the removal of the suit into the Circuit Court of the United States for the District of Nebraska, the defendant having remained throughout, and being still, a citizen of Nebraska. The State Court made an order removing the cause, and the defendant then moved the Circuit Court to dismiss the case,

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McLean v. The St. Paul and Chicago Railway Company.

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or remand it to the State Court, for want of jurisdiction. The motion was heard before Mr. Justice Miller and Judge Dundy. The Court held that the Act of 1867 was within the constitutional power of Congress. The Court then proceeded, Mr. Justice Miller delivering the opinion: "The next question is, whether the fact that, pending the litigation in the State Court, the plaintiff changed his citizenship from Nebraska to Iowa, stands in the way of the removal of the cause? The Act does not, in terms, prescribe the time at which the citizenship of the moving party must be acquired. Nor is there anything from which to imply that a time was intended to be limited in that regard. Had Congress intended to confine the privileges of the Act to parties who were citizens of different States at the commencement of the suit, it would have been very easy so to have provided. It did not see fit so to do. On the other hand, in express terms, or, at least, by the strongest implication, it provided otherwise. The language is: 'Where a suit is now pending, or may hereafter be brought, in any State Court, in which there is a controversy between a citizen,' &c., which is as much as to say, whenever a controversy shall arise, in a suit pending in a State Court, the parties to which shall at any time be citizens of different States, the cause may be removed. No time at which the citizenship shall be acquired is limited. So, the inference is, that it may be acquired at any time. Nor is the case changed by the circumstance that the citizenship in Nebraska was abandoned, and that in Iowa acquired voluntarily, or even for the purpose of securing the right of removal. It has been repeatedly held, that the fact that a party had removed from one State to another, in order to be able to bring his suit in the Federal Court, did not affect the jurisdiction." The conclusion of the Court was, that Congress intended, in reference both to plaintiffs and to defendants, to confer the right of removal from the State Courts, at any stage of the proceedings before the final trial was begun, and when the requisite citizenship was found to exist, on the making of the proper affidavit and the giving of the required bond. In the

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McLean v. The St. Paul and Chicago Railway Company.

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particulars involved in the suit now before us, the provisions of the Act of 1875 are like those of the Act of 1867. This suit is within the terms of § 2 of the Act of 1875. It is a civil suit, brought in the State Court after the passage of the Act of 1875, the matter in dispute exceeds the requisite amount, and there is a controversy in it between citizens of different States. The petition and bond were in proper form. The State Court accepted them and made the order of removal. The expression in the Act of 1875, "any suit now pending or hereafter brought, in which there shall be a controversy between citizens, either party may remove it," is in the same form, and must have the same meaning, in respect to the point now under consideration, as the expression in the Act of 1867, "where a suit is now pending or may hereafter be brought, in which there is a controversy between a citizen and a citizen, the latter citizen, whether plaintiff or defendant, may file a petition for the removal of the suit." The observations of Mr. Justice Miller in regard to the Act of 1867 apply fully to the Act of 1875.

In *McGinnity v. White*, (3 *Dillon*, 350,) the plaintiff, in February, 1870, brought a suit in a State Court of Nebraska, against five defendants. One of them, White, after answering, and in April, 1875, filed a petition for the removal of the suit into the Circuit Court of the United States for the District of Nebraska, under the Act of July 27th, 1866, (14 *U. S. Stat. at Large*, 306.) The petition set forth that White "is now, and, since the 19th day of February, 1873, has been, a citizen of the State of New Jersey," and that "the plaintiff is, and was at the time of bringing the suit, a citizen of Nebraska," and contained the other necessary averments. The State Court made an order removing the cause. A motion was made before the Circuit Court, held by Judges Dillon and Dundy, to remand the cause to the State Court. The opinion of the Court was delivered by Judge Dillon. He cites the case of *Johnson v. Monell*, as having determined, that, under the Act of 1867, "a party to a suit, who, while it is pending, becomes a *bona fide* citizen of another State, is

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McLean v. The St. Paul and Chicago Railway Company.

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entitled, if the other required conditions are met, to have the case removed." He adds: "As both Acts give the right to apply for the removal 'at any time before the trial or final hearing of the cause,' I can see no difference in this respect between the Act of 1866 and the Act of 1867, and the reasoning in the case cited seems to be applicable here and to favor the right of removal. Pending the suit in the State Court, the defendant has, in good faith, become a non-resident of the State of Nebraska, and a citizen of another State, and it is this which constitutes the substantial ground upon which the right, under the Act of 1866, to the removal, is based." The motion to remand was denied. See, also, *Yulee v. Vose*, (9 *Otto*, 539.)

On the facts set forth in the petition in this case, this suit was and is one properly removable into this Court, under the Act of 1875.

As to the non-filing of the record by the 7th of April, the 3d section of the Act of 1875 provides, that, when the proper petition and bond, in a proper suit, are presented to the State Court, it shall be the duty of that Court to accept them and proceed no further in the suit. It then goes on to provide, that, "the said copy," that is, a copy of the record in the State Court, in the suit, "being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in said Circuit Court." The words "as aforesaid" are found in the same connection in § 12 of the Act of 1789, and in § 5 of the Act of March 3d, 1863, (12 *U. S. Stat. at Large*, 757,) and in the Act of 1866, and in the Act of 1867, and in § 2 of the Act of July 27th, 1868, (15 *Id.*, 227,) and in § 639 of the Revised Statutes. They cannot properly have any other meaning than that, when the copy is entered by the party removing the cause, it must be entered at the time mentioned before as the time to be named in the bond, namely, the first day of the then next session of the Circuit Court. It is true, that there are exceptional cases provided for in § 7 of the Act of 1875, in which it is declared that the bond

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McLean v. The St. Paul and Chicago Railway Company.

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may be satisfied and discharged by the filing of the copy of the record by the party removing the cause after the day named in the bond. But the present case is not one of such exceptional cases. The term of this Court to which this suit was removable commenced more than twenty days after the petition and bond were filed in the State Court, and it does not appear that the clerk of the State Court refused to furnish a copy of the record. On the contrary, the certified copy of the record filed in this Court was certified by such clerk on the 18th of March, 1879. The two cases in this Court, of *Broadnax v. Eisner*, (13 *Blatchf. C. C. R.*, 366,) and *Bright v. Milwaukee R. R. Co.*, (14 *Id.*, 214,) are authorities to show that the defendant has lost its right to perfect the removal of this cause, and that this cause must be remanded. The plaintiff has not waived the delay in filing the copy, nor does the allegation in the affidavit of the defendant's attorney, that, by inadvertence, the copy was not filed on the first day of the term, furnish a sufficient excuse to authorize this Court to say that it acquired jurisdiction of the cause by the filing of the copy on the 10th of April. The case last cited is authority, also, for holding, that there is nothing in § 5 of the Act of 1875 which prevents this Court from remanding this cause. The case of *Osgood v. Chicago R. R. Co.*, (6 *Bissell*, 330,) was, on the facts involved in the decision of it, not like the present case. The copy of the record of the State Court had, in that case, been filed in the Circuit Court in time by the party removing the cause, and the cause had, in all respects, been "removed" to the Circuit Court, within the language of § 5. The present case has not been "removed" to this Court, because that has not been done, which, under § 3 of the Act, authorizes this Court to proceed in the suit. In regard to what is said in the case in 6 *Bissell* respecting the authority of the Circuit Court, since § 5 of the Act of 1875 was enacted, to dismiss and remand causes, it may be observed, that the provisions of it are enabling and not prohibitory, and that they are such as not to indicate any intention in Congress to take away from the Circuit Court

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Wormser v. Dahlman.

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the power of remanding a cause to the State Court, on the ground that the prescribed prerequisites necessary to authorize the Circuit Court to proceed in the cause have not been complied with.

The motion to remand this cause to the State Court is granted, with costs to be taxed.

*D. M. Porter*, for the plaintiff.

*Charles W. Bangs*, for the defendant.

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ISIDORE WORMSER AND SIMON WORMSER

vs.

CHARLES DAHLMAN, ARTHUR A. KLINE AND ADOLPH B. ROTH.

W. brought suit in a State Court of New York against D. and K. and R., as co-partners, to recover on a promissory note. Process was served on D. alone. He alone appeared. W. and K. were, at the time the suit was commenced, citizens of New York. D. and R. were, at that time, citizens of California. D. took proceedings, under subdivision 2 of § 639 of the Revised Statutes, to remove the suit, so far as it concerned him, into this Court, without notice to the attorney for W. The petition for removal was not signed or verified by D., but by D.'s attorney in the suit. W. moved to remand the cause to the State Court: *Held*,

- (1.) Subdivision 2 of § 639 of the Revised Statutes was not repealed by the Act of March 3d, 1875, (18 U. S. Stat. at Large, 470;)
- (2.) The suit was one in which there could be a final determination of the controversy, so far as concerned D., without the presence of K. and R., as parties;
- (3.) Any rights which W. would have had as against K. and R., from serving process on D., remain to W. in this Court;
- (4.) Notice of the application for the removal was not necessary;
- (5.) The petition was sufficiently signed and verified.

(Before BLATCHFORD, J., Southern District of New York, May 14th, 1879.)

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Wormser v. Dahlman.

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BLATCHFORD, J. This suit was commenced in the Superior Court of the city of New York. Process was served on the defendant Dahlman alone. He appeared in the State Court in the suit, and the complaint was put in and he answered it. No other defendant has appeared or answered either in the State Court or in this Court. The plaintiffs and the defendant Kline were, at the time the suit was commenced, citizens of the State of New York, and the other defendants were, at that time, citizens of the State of California. The suit is one against the three defendants as copartners, to recover on a copartnership liability, on two promissory notes, made by the defendants as copartners. Dahlman presented to the State Court a petition, verified April 1st, 1879, setting forth, "that there can be a final determination of the controversy, so far as it concerns your petitioner, without the presence of the other defendants as parties to the cause," and "that your petitioner is desirous, so far as concerns him, of removing the cause to the United States Circuit Court," and praying, "that, so far as it concerns him, the cause may be removed to the next Circuit Court of the United States for the Southern District of New York." The necessary bond was given, and was approved by a Judge of the State Court. It does not appear that the plaintiffs' attorney had notice, in the State Court, of the proceedings for removal, or that any order of removal was made by the State Court. The defendant Dahlman has filed in this Court papers certified by the clerk of the State Court, as a copy of the record in the suit, and of all process, pleadings and other proceedings in it, which consist of the summons, notice to the plaintiffs' attorneys of Dahlman's appearance, complaint, answer of Dahlman, petition for removal and bond on removal. On filing such papers in this Court, the defendant Dahlman entered a rule in this Court, continuing the cause therein, and noting his appearance therein by an attorney, and served on the plaintiffs' attorney a copy of such rule with notice of its entry. The plaintiffs now move to remand the cause to the State Court.

It is plain that the proceedings for removal were taken

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Wormser v. Dahlman.

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not under the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) but under the 2d subdivision of § 639 of the Revised Statutes, which is a re-enactment of the provisions of the Act of July 27th, 1866, (14 *U. S. Stat. at Large*, 306.) Under the Act of 1875, nothing less than the whole suit can be removed into this Court. Under the Act of 1866 and subdivision 2 of § 639 of the Revised Statutes, the suit may be removed only as against the defendant who petitions to have it removed only as against him.

It is contended for the plaintiffs, that subdivision 2 of § 639 of the Revised Statutes, is repealed by the Act of 1875, as being in conflict with the provisions of that Act. I am not referred to any case in which it has been distinctly held, in a Federal Court, in a case involving the point, that said subdivision 2 is repealed by the Act of 1875. On the contrary, in *Girardey v. Moore*, (5 *Central Law Journal*, 78,) it was held by Mr. Justice Bradley, in a case involving the point, that said subdivision 2 is not repealed by the Act of 1875; and Judge Dillon, (*Removal of Causes*, 2d edition, p. 28,) observes, that it is, probably, the better view, that, if a case is brought within the provisions of the Act of 1866, it may still be removed thereunder; that cases may arise of such a nature that they would fall within the Act of 1866, and not within that of 1875; and that, in such event, the latter Act should not be held to repeal, by implication, the former. This is, I think, the proper view. The Act of 1875 does not expressly repeal said subdivision 2 of said § 639; and, as the Act of 1875, in § 2, only relates to the removal of the whole suit, while said subdivision 2 of said § 639 relates to the removal of the suit as against one of two or more defendants, if the suit is one in which there can be a final determination of the controversy, so far as concerns such one defendant, without the presence of the other defendants as parties in the cause, I concur with Mr. Justice Bradley in the view that there is no conflict between the provisions, and no reason why both should not stand, and that said subdivision 2 of said § 639, so

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Wormser v. Dahlman.

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far as it authorizes a defendant to remove a cause as to him, is not repealed by the Act of 1875.

It is also contended, for the plaintiffs, that this suit is not one in which there can be a final determination of the controversy, so far as concerns Dahlman, without the presence of the two defendants sued with him as copartners, as parties in the cause. The view urged is, that, as the three are sued as copartners, no recovery can be had against Dahlman unless the copartnership shall be established, and that, in such event, the determination must be against the three. The plaintiffs, as part of their causes of action on the two notes, set forth, in their complaint, that they signed a composition of such notes, and surrendered them, because of fraudulent representations made by the defendants, inducing such signing and surrender. The plaintiffs contend, that, as such composition was one with the defendants jointly and as copartners, the controversy cannot be determined without the presence of all of them.

The language of subdivision 2 of § 639 of the Revised Statutes is not that the suit must be one in which there can be a final determination of the whole controversy instituted by the plaintiff, as regards all the defendants, without the presence of all, but is only that the suit must be one in which there can be a final determination of the controversy so far as concerns the defendant petitioning for removal, without the presence of the other defendants as parties in the cause. I do not see why this controversy cannot be determined finally, so far as concerns Dahlman, with him alone served or appearing as defendant. He cannot now be heard to allege that the others must be served or appear in this Court. The plaintiffs have the right to proceed at the same time with this suit in the State Court as against the other two defendants. As this is a suit at law, and the State practice governs it, if the plaintiffs, serving process only on Dahlman, would, if the suit had all of it remained in the State Court, and it had been tried there on the present pleadings, and they had recovered judgment, have been entitled to a judgment against all the defendants as composing the copartnership which made the notes, so far as to be able to en-

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Wormser v. Dahlman.

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force such judgment against the joint property of all such defendants, and against the separate property of Dahlman, they will be entitled to a like judgment, with like effect, in this Court. The words in the statute, "the presence of the other defendants as parties in the cause," means their presence by being served with process or by appearing. Any rights which the plaintiffs would have had in the suit as against the other two defendants, not served or appearing, by reason of the service on or appearance of Dahlman, still remain to the plaintiffs, and are brought into this Court by the coming of the plaintiffs and of Dahlman into this Court.

It is objected by the plaintiffs, that the petition for removal is not signed or verified by Dahlman, but is signed and verified by the attorney for Dahlman in the suit. I think the petition is sufficiently signed and verified.

There is no force in the objection that notice of the application for removal was not given to the plaintiffs' attorney.

The motion to remand the cause is denied.

*D. M. Porter*, for the plaintiffs.

*R. S. Newcombe*, for the defendant Dahlman.

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The Mercantile Trust Company v. The Lamoille Valley Railroad Company.

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THE MERCANTILE TRUST COMPANY

vs.

THE LAMOILLE VALLEY RAILROAD COMPANY, THE MONTPELIER AND ST. JOHNSBURY RAILROAD COMPANY, THE ESSEX COUNTY RAILROAD COMPANY, LUKE P. POLAND AND ALBERT B. JEWETT. IN EQUITY.

The plaintiff, owning first mortgage bonds of a railroad company, brought this suit, in this Court, to foreclose the mortgage and remove the two trustees, alleging that one was the sole trustee in a claimed preference mortgage of the same property, which he was seeking to foreclose in a Court of the State, in which proceeding the other trustee had been appointed a receiver of the property, and was in possession. There were demurrers, and a plea of the pendency of those foreclosure proceedings, and a plea of the filing of a cross-bill therein by the trustees of the first mortgage, for foreclosure, on the day after the filing of the bill in this suit, in which this plaintiff was named a defendant, and on whom process was served, by an order of the State Court, out of the State, before the service of the subpoena in this suit. The case was heard on the pleas set down for argument and the demurrers: *Held*,

- (1.) This Court will not stay this suit until the proceedings in the State Court shall be completed;
- (2.) This Court can and will proceed with this suit, although the property is in the possession of a receiver of the State Court, though it will do nothing to disturb such possession, or to interfere with the receivership;
- (3.) The service of the process of the State Court on the plaintiff, as a defendant to the cross-bill, out of the State, was not effectual;
- (4.) The fact that the mortgage trustees brought the cross-bill, did not draw the plaintiff in, and make him a party to it, by representation, as the trustees represent, in the suit, only the rights of such bondholders as join in it;
- (5.) The position of the trustees is such that they cannot alone properly represent the bondholders, and no refusal by them to foreclose, after a request by the plaintiff, need be shown;
- (6.) It is no objection to this suit that this Court cannot settle the accounts of the receiver.

(Before WHEELER, J., Vermont, May 21st, 1879.)

WHEELER, J. This is a bill in equity brought by the plaintiff, as owner and holder of one hundred thousand dol-

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The Mercantile Trust Company v. The Lamoille Valley Railroad Company.

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lars of the first mortgage bonds of the railroad of the defendants, which are railroad corporations, in behalf of itself, and all other like owners and holders who are non-residents of the State of Vermont, and wish to join therein, for a foreclosure of the mortgage, and removal of the trustees, alleging that one of the trustees is the sole trustee in a claimed preference mortgage of the same property, which he is seeking to foreclose in the State Court, in which proceeding the other trustee has been appointed a receiver of the property, and is now in possession, with another person, as such receiver. Some other bondholders have become parties here with the plaintiff. Some of the defendants have demurred to the bill, and others have pleaded the pendency of those foreclosure proceedings, and a cross-bill filed therein by the trustees of the first mortgage, for foreclosure, on the day after the filing this bill in this Court, in which this plaintiff was named a defendant, and on whom process was served, by an order of that Court, out of the State, before the service of the subpoena in this cause. The plaintiff set down the pleas for argument, and the cause has been heard upon the pleas and the demurrers.

Before proceeding to the argument of the questions so raised, it was moved, in behalf of the defendants, that this Court should stay these proceedings until those in the State Court should be completed, and thereby compel the plaintiff to become a party there, if not already one, and to proceed there instead of here. But, Courts have not the right to disown their jurisdiction. It is their duty to hear and determine causes properly brought before them, and to determine whether they are properly so brought, if such question arises, and not to advise or compel the parties to go elsewhere for relief, even though it should appear that the relief might better be obtained elsewhere. In Magna Charta, chap. XXIX, it was declared by the King, for his Courts: *Nulli vendemus, nulli negabimus, aut differemus, rectam, vel justitiam*. This is fundamental to the duties of Courts. The duty cannot be fulfilled by sending parties elsewhere for what they have a

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The Mercantile Trust Company v. The Lamoille Valley Railroad Company.

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right to here, nor by compelling them to wait until some other time for what they have a right to now. If the plaintiff has a right to prosecute this suit in this Court, it has, also, the right to have it proceeded with according to the course of the Court, and, as question is made as to whether it has the right to so proceed, it has the right to have that question heard and determined, as may appear to be right, also. There was no proper course but to hear the parties upon the questions raised, and there is no proper way now but to pass upon them.

It is familiar learning, that, upon the demurrers, the bill is to be taken as true, and that, upon the pleas, the bill and pleas are all to be taken as true, unless inconsistent, in which case the allegations in the pleas prevail. These pleadings here raise two principal questions, both of which have been very thoroughly argued by counsel familiar with questions of this sort, and with these subjects. The first is, whether this Court should proceed at all, or has jurisdiction to do so, while the property which is the subject of the controversy is in the custody of the State Court, in the hands of its receivers. This question arises upon both the demurrers and the pleas, for the fact of the receivership is alleged in the bill as well as in the pleas.

That this Court ought not to, and cannot lawfully, go so far with the proceedings as to take the possession of the property from that Court, or as to in any manner interfere with the possession of it by that Court, or its officers, is not disputable. Such a course would be contrary to the provisions of the statute of the United States, (*Rev. Stat., sec. 720,*) which prohibits the writ of injunction from being granted by any Court of the United States, to stay proceedings in any Court of a State, unless authorized by some law relating to bankruptcy. Although the possession might be trenched upon by some process or proceeding different from an injunction in form, still the effect would be the same as if the proceedings of the State Court should be stayed, and the statute would be violated in spirit, if not in letter. And, if there

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The Mercantile Trust Company v. The Lamolille Valley Railroad Company.

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were no such statute, as the jurisdiction of the two Courts in this class of cases is concurrent, and not revisory one of the other, the one first acquiring jurisdiction, by proceedings involving the possession of specific property, could not, upon common and well-settled principles, be disturbed in such possession by the other, while the proceedings involving the possession should be pending. The right to the possession of the property would be as exclusive as that to the rest of the proceedings. So, the debatable question here is, not whether this Court will grant relief that will disturb the possession of the State Court, for, surely, it will not do that, but whether it will hear and determine any question, or grant any relief, concerning the right to the property, and not extending to the possession, while that Court has possession. There is nothing, either in the letter or the spirit of the statute, that prohibits a party having a question of right, or a claim to relief, that can be determined without meddling with the possession of any Court, from having the question determined or the relief granted by any Court of competent jurisdiction for the purpose. Neither is there anything in the nature of things which should prevent. There could be no conflict between Courts or their officers, growing out of such proceedings, nor are there any apparent evils likely to follow. Neither do the authorities go to that length. In *Peck v. Jenness*, (7 How., 612,) Mr. Justice Grier, in delivering the opinion of the Court, said, that the Court having the possession of the property should have the disposition of "every question which occurs in the case," not including in the statement every question concerning the property. The cases which have followed are consistent with that distinction, and, in view of it, *Watson v. Jones*, (13 Wall., 679,) is not at variance with the others. The right of the State Court to the possession of the property during the continuance of the litigation before that Court involving the possession, was sedulously respected, and the relief granted was carefully shaped to the disposition of the possession by the State Court. In that case, Mr. Justice Miller, after stating the pleadings and proceedings, and that

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The Mercantile Trust Company v. The Lamoille Valley Railroad Company.

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the bill contained a special prayer for relief that would interfere with the possession and disposition of the property by the State Court, and that it contained a general prayer that would cover other relief, said: "Under this prayer for general relief, if there was any decree which the Circuit Court could render for the protection of the right of the plaintiffs, and which did not enjoin the defendants from taking possession of the church property, and which did not disturb the possession of the Louisville Chancery, that Court had a right to hear the case and grant that relief." The authority of that case has not been questioned by the Court which decided it, and it is not open to question here. In this case, as in that, some of the relief which the bill might cover would interfere with the possession of the State Court, and some of it would not. The execution of an order of sale, under the provisions of the mortgage, or of an order for the delivery of possession, under other provisions, would have that direct effect, and, perhaps, the general prayer for relief would cover either; but, as before mentioned, it is clear that the plaintiff cannot have such relief. None can be had except that which will not interfere with the present possession. A decree of foreclosure would not. It would only cut off the equity of redemption of the plaintiff's bonds, which the mortgagors now have, and would not affect the possession at all, but only the right. (*Carpenter v. Millard*, 38 Vt., 9; *Shaw v. Chamberlin*, 45 Vt., 512; *Brooks v. Vt. Cent. R. R. Co.*, 14 Blatchf. C. C. R., 463.) A mortgagee, in Vermont, may have an action of assumpsit to recover his debt, an action of ejectment to recover possession of the mortgaged premises, and a suit in equity to foreclose the right to redeem, all going on at the same time, each in a different Court from either of the others, and neither will interfere with the other, nor will the pendency of any of them abate either of them. The remedy in each case is distinct from that in the others. This was so at the common law.

The objection on account of the receivership cannot prevail to prevent proceeding in this cause, so far as it can go

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The Mercantile Trust Company v. The Lamoille Valley Railroad Company.

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without interfering with the receivership ; and a decree of foreclosure can be had, if the plaintiff is otherwise entitled to one, without involving such interference.

The other principal question is, whether the State Court had the same parties before it, either actually or by representation, for the same relief, so that it had jurisdiction of the cause, before the parties were brought before this Court, so as to give jurisdiction. One branch of this question is, whether the service of the process of the State Court upon the plaintiff here, as a defendant to the cross-bill there, out of the State, would be effectual. A party having property within a State submits it to the laws of the State and to such proceedings as they provide for, and, if they provide for proceedings against it without personal service, or even without any service, he must, probably, submit to them ; but he cannot justly be compelled to submit to any process which the laws of the State do not provide for. The laws of the State of Vermont provide for service upon non-residents, in Chancery cases, by publication in a particularly specified manner. (*Gen. Stat.*, 249, *sec.* 21.) They also provide for constructive service upon non-resident defendants whose property is attached, in actions at law, (*Gen. Stat.*, 296, *sec.* 48 ; ) and, also, for service in various modes upon non-resident defendants in divorce proceedings. But they nowhere provide for any order by the Courts of Chancery, to serve their process out of the State, nor for serving it out of the State, in the manner in which this was served, or in any other manner. Such service has often been made, sometimes where the Court required it, in order that actual notice might be given, as a matter of fairness, and sometimes as a substituted service. But, whether it is operative at all, as the only service, has been much doubted ; and that question was expressly avoided and left undecided by the Supreme Court of the State, in *Cheever v. Birchard*, (*Pamphlet Opinion* of Steele, J., 10.) There is no known decision of the State Court holding such service to be good or bad, but there are several that hold similar service in proceedings at law to be wholly void, even in

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The Mercantile Trust Company v. The Lamoille Valley Railroad Company.

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suits concerning real property within the State. (*Propagation Society v. Ballard*, 4 *Vt.*, 119; *Skinner v. McDaniel*, 4 *Vt.*, 418.) The Court has no jurisdiction or authority to act without the State, and it is not easy to see how it can affect any party by anything done by it, or under its order, without the State; nor how it can affect any right within the State belonging to parties without, otherwise than by proceedings under and according to the laws of the State. As viewed here, that service was not operative upon the plaintiff, nor such as it was bound to take any notice of.

But, if that service had been operative, a question whether the proceeding to which it would make the plaintiff a party was a proper one for obtaining the relief sought here, would still remain. It would have made the plaintiff a defendant to a cross-bill for the foreclosure of a mortgage securing its own debt, which might not be a very favorable position in which to obtain the affirmative relief of foreclosure in its own favor.

It is urged, however, that, because the mortgage trustees are parties, they draw the plaintiff in and make it a party, by representation, whether it will or not. The trustees hold the legal title to the mortgaged estate, but not the mortgage debt. It is quite familiar doctrine, that a mortgage is incident to the debt, which is always the principal thing. The default which would forfeit the estate would be to the bondholders owning the debt, not to the trustees holding the legal estate. The trustees could not foreclose the mortgage without the support of the bondholders, or some of them, in it. If they should undertake to do so, and no bondholder should come in and prove his bonds, they could have no complete decree. But, bondholders may foreclose and have a full decree, whether the trustees will or not. At the argument, counsel very familiar with these subjects were pressed to show a case where a bondholder had undertaken to foreclose and been denied that relief, but no such case was produced; and it was admitted there were none. The bondholders have control of the bonds and the trustees have not. This is what

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The Mercantile Trust Company v. The Lamoille Valley Railroad Company.

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was meant in *Brooks v. Vt. Central R. R. Co.*, in stating that the trustees were not agents for the bondholders, and what was understood to be the effect of the authorities cited there in support of that proposition. It has been many times held, against the objection of the mortgagors that all were not joined in a proceeding to foreclose, that all need not be joined, which seems to be very plain. It is equally plain, that some must join, at some stage, in order to have a perfect decree. Suppose some do join and others do not, and a decree perfected to foreclose the right to redeem the bonds of those who do, and not of the rest. If the property should be redeemed from that decree that would not pay the other bonds, nor cut off the owners of them from their right to foreclose. If it should not be redeemed, while the right of the mortgagors to it would be extinguished, that of the holders of the bonds not foreclosed would not be, but would still remain as against those who did foreclose, and could be enforced. (*Wright v. Parker*, 2 Aik., 212; *Langdon v. Keith*, 9 Vt., 299; *Belding v. Manly*, 21 Vt., 550; *Brooks v. Vt. Central R. R. Co.*, 14 Blatchf. C. C. R., 463.) This shows, that, when the trustees foreclose, the bondholders who join are the real parties and foreclose in behalf of their own rights, through the trustees, and that the trustees do not represent the rights of any who do not join. In an action of ejectment, depending upon the strict legal title, it would be different. There, the trustees could prevail alone, without the bondholders, but the bondholders could do nothing without the trustees. But, in equity, the real owner is regarded and the nominal owner is not. And, as this case is situated, the trustees may not represent all the rights of the bondholders as well as they would in ordinary cases. Poland, one of the trustees in the first mortgage, is sole trustee in another mortgage, claimed to have preference. The State Court has the trustees of both parties to the proceedings there. With the trustees as parties alone, the only decree there could be would be, either that he should be foreclosed unless he should pay himself and the other so much by such a time, or that both

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The Mercantile Trust Company v. The Lamoille Valley Railroad Company.

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should be foreclosed unless they should pay him so much by such a time. In either case he could redeem by paying himself, which would not accomplish anything. It would all be within himself. He cannot represent the plaintiffs and their opponents at the same time. Bondholders of each mortgage are made parties, it is true, and such as may fairly represent the interests common to each class, but, if so, they do not represent in fact all others of the same classes. They can only act for themselves. Whether those proceedings shall abate this suit, depends as well upon its being for the same relief in full, as upon being between the same parties, and the relief available there might fall far short of an effective foreclosure, as is sought here. This is not the fault of the trustees, but of the position in which they have been placed by those who have made them trustees.

It is said, in behalf of one demurring party, that the bill does not show any request from the plaintiff to the trustees to foreclose, and that they are not entitled to proceed in their own behalf without such request and a refusal or failure to comply. It is true, that no such request is alleged, so far as has been observed, but it is also true, for the reasons just stated, that none would be of any avail. The trustees are not so situated that they can foreclose alone.

It is also objected, that this Court cannot proceed to a decree of foreclosure in behalf of the plaintiff, because such a decree cannot be perfected without ascertaining the sum due in equity, and that this Court cannot settle the accounts of the receivers, to ascertain how much there is in their hands to apply on the mortgage debt, because it has no jurisdiction over them. It is true, that this Court cannot settle their accounts. It is also true, that they were not appointed in a suit to which the plaintiff was a party; if the plaintiff had been a party there, it could not maintain this suit here; they were appointed in a suit between others and the mortgagors. The sum due in equity is to be ascertained by fixing the amount lawfully due after deducting payments. The source from which the mortgagors derive means of pay-

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**The Mercantile Trust Company v. The Lamoille Valley Railroad Company.**

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ment, or what means they might derive if they could have their property, or how much it would pay if the plaintiff had it, or the avails of it, is of no consequence, unless the plaintiff has had it. It was the duty of the mortgagors to make payment, and that their property got into litigation is no lawful excuse for not making it. All payments which they make or procure to be made, before the accounting, will apply as payment to keep down the sum due, and all made afterwards, and before the expiration of the time of redemption, will help them redeem. If they would have their property in the custody of a Court apply in either way, they must relieve it from the custody, so it can be applied, the same as if it had been attached or taken in execution, in some suit against them. This may be unfortunate, but, if so, it is due to the insolvency of the mortgagors, not to the fault of the plaintiff.

Many books and cases have been cited in behalf of the defendants, in support of their objections, in many of which there are rulings and *dicta* which would be strongly in their favor if the questions had arisen in the same way, and the proceedings had been to the same purpose and effect as these; more than time and space admit of specific reference to. What is said in some of them is with reference to the effect of citizenship of actual parties upon the question of jurisdiction of the Federal Courts; what is said in some others is in respect to foreclosure under laws which require sale of the property, and division of the avails, and not concerning a foreclosure to merely bar the equity of redemption; and in none of them, so far as observation has extended, has anything been held upon questions precisely like these, contrary to what is here held, or said which, however applicable there, would be so here.

The pleas, although not to the whole bill, are to the relief by foreclosure, and as such cannot stand; neither can the demurrers.

However desirable it might be that this cause should be before a Court where all interested in the property could be

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Corbett v. Gibson.

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made parties, and all rights to it be adjusted, still, as the plaintiffs have the right to come into this Court for such relief as they can have here, and they can have some relief here, the Court must entertain their cause in respect to that relief. The pleas and demurrers are overruled.

*Edward J. Phelps* and *Guy C. Noble*, for the plaintiff.

*Benjamin F. Fifield*, *Luke P. Poland* and *Harry D. Hyde*, for the defendants.

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JOHN J. CORBETT vs. HORATIO G. GIBSON.

The Major General commanding the Department of the East, in the Army of the United States, was served with a *subpoena duces tecum*, in this suit, requiring him to produce in Court official papers on file in the office of the Headquarters of such Department. A motion was made that such *subpoena* be set aside. It appearing that copies of such papers could be read in evidence, and it not appearing that the originals would serve a different purpose from the copies, or that the copies could not be procured: *Held*, that the motion must be granted.

(Before BENEDICT, J., Eastern District of New York, May 26th, 1879.)

BENEDICT, J. In this action, the plaintiff has served upon Major General Hancock, commanding the Department of the East, in the army of the United States, a *subpoena duces tecum*, requiring him to produce "all books, papers, documents, memoranda, letters or writings, in the office of the headquarters of the Department of the East, relating in any way to the plaintiff, sometimes called Patrick Corbett, formerly a private in Battery E, Third Artillery, U. S. Army, and his arrest, trial and imprisonment in Fort Wadsworth, by the defendant, from November 28th, 1877, up to date, now in your custody, and all other deeds, evidences and writings which you have in your custody or power, relating to the premises." A mo-

tion in behalf of Major General Hancock, to set aside this *subpœna*, is now made by the Judge Advocate of the army. The writ exhibits gross irregularity upon its face, such as, that it is issued in the name of the People of the State of New York; that it requires the production of the papers before a Judge, instead of before the Court; that it is not tested in the name of the Chief Justice of the United States; and the like. But, passing these, to consider the question as to which my opinion is desired, namely, whether Major General Hancock can properly be compelled, by a *subpœna duces tecum*, to produce in Court official papers such as are described in this *subpœna*, and on file in the office of the headquarters of the Department of the East, I remark, that such papers are to be deemed public documents on file in a public office, and that the right to require the removal thereof from the official place of deposit, for production in the various Courts, would cause great and unnecessary inconvenience, without any corresponding advantage. The general rule in regard to public documents is, therefore, applicable to such papers, and they may be proved by an authentic copy. The rule referred to is thus stated in *Greenleaf's Evidence*, (vol. 1, sec. 484:) "Every document of a public nature, which there would be inconvenience in removing, and which the party has a right to inspect, may be proved by a duly authenticated copy." In *United States v. Percheman*, (7 Pet., 51, 85,) it was held, that a copy of a public document, furnished by an officer whose duty it is to keep the original, may be read in evidence.

The only reason that has been suggested in this case, for requiring the original papers in question, is, that their production is necessary, because copies could not be read in evidence. But, as already stated, copies may be read, and the production of the original is, therefore, unnecessary. Such being the case, no reason exists for the *subpœna duces tecum*, and it should be set aside. If it appeared that the original papers, when produced, would serve a different purpose from the copies, or that the copies of the papers could not be pro-

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Corbett v. Gibson.

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cured, a different case would be presented. An order will be entered setting aside the *subpœna* in question, and, also, the *subpœna* issued to the Inspector General, to which the above remarks are also applicable.

*W. Frank Severance*, for the plaintiff.

*Herbert G. Hull*, for the defendant.

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JOHN J. CORBETT vs. HORATIO G. GIBSON.

After this cause had been set down for trial at the present term, the defendant moved for an order to compel the plaintiff's attorney to furnish a sworn statement of the residence, occupation and present address of the plaintiff: *Held*, that the motion must be denied, without prejudice to other proceedings to secure the presence of the plaintiff at the trial.

(Before BENEDICT, J., Eastern District of New York, May 27th, 1879.)

BENEDICT, J. This case having been set down to be tried at the present term, the defendant now moves for an order compelling the plaintiff's attorney to furnish a sworn statement of the residence, occupation and present address of the plaintiff. It is not to be doubted, that the plaintiff in whose name the action is brought is a real person, whose identity is known to the defendant. That the suit is authorized by the plaintiff is proved by the fact that the complaint is sworn to by the plaintiff personally. The moving papers contain no facts leading to the supposition that the plaintiff has died since the commencement of the suit, and such death is not suggested. The order sought is not, therefore, required for the purpose of enabling the plaintiff to be identified, or to ascertain the fact of his present existence. Neither is there any reason for the order, on the main ground upon which it is urged here, namely, to enable the defendant to examine the

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Corbett v. Gibson.

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plaintiff previous to the trial, in accordance with the practice in the Courts of the State, because no such right exists in suits in the Courts of the United States. (*Beardsley v. Littell*, 14 *Blatchf. C. C. R.*, 102.) Nor does the desire to apply for security for costs from the plaintiff, if he prove to have become a non-resident, afford ground for the order, because, the application to compel security for costs would not now be granted, a near day having been fixed for the trial of the cause, by consent of the defendant, without any intimation that security for costs was desired, although it appears that all the facts leading to a supposition that the plaintiff has become a non-resident have been known to the defendant for several months. It must, therefore, be held, that, in the present case, no sufficient ground for the order sought has been made to appear, and the motion must be denied.

In denying the motion, I do not intend to be understood to deny the right of the defendant to have the plaintiff in Court at the trial. While, in most cases, no reason exists for the presence of the opposite party on the trial, in the present case it may well be that justice cannot be done without the attendance of the plaintiff, in order, among other things, that he may be examined as a witness upon the question of damages, and also in regard to his interest in the action. The present motion, although the prayer is for such other relief as may be required, can hardly be treated as an application to postpone the trial until the whereabouts of the plaintiff can be ascertained and his presence on the trial secured. That relief, if it be desired, would properly be made the subject of an application by itself, and upon different papers.

For these reasons the present motion is denied.

*W. Frank Severance* for the plaintiff.

*Herbert G. Hull*, for the defendant.

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The United States v. Bennett.

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## THE UNITED STATES vs. DEBOIGNE M. BENNETT.

There is no provision of law whereby an indictment found in a Circuit Court can be remitted by it to the District Court, unless the District Attorney deems it necessary.

The provisions of § 3,898 of the Revised Statutes, as amended by § 1 of the Act of July 12th, 1876, (19 *U. S. Stat. at Large*, 90,) which forbid the depositing in the mail, of any obscene or indecent publication, are not repugnant to any provision of the Constitution of the United States.

It is not necessary that an indictment under that statute, in respect to a book, should set forth *in haec verba* the alleged obscene book, or the alleged obscene passages in it, if the indictment states that such book is so indecent, that it would be offensive to the Court and improper to be placed on its records, and that, therefore the jurors do not set forth the same in the indictment, and if the book is sufficiently identified in the indictment for the defendant to know what book is intended.

The defendant can always procure information of the charge which he is to meet, so far as regards being furnished with a copy of the publication, or with a copy of the alleged obscene parts of it, by applying to the Court, before the trial, for particulars.

The question whether, on the matter alleged to be obscene, a verdict that it is obscene would be set aside, as clearly against evidence and reason, can be fully raised before the trial, by a motion to be made on the indictment and a bill of particulars; and, under all other circumstances, it is for the jury to say whether the matter is obscene or not.

A pamphlet of 24 pages, consisting of a sheet and a half secured together by stitching, and with a cover of four pages, and having a title page, is properly described as a book, in an indictment under said statute.

Whether a count in respect to a publication merely, without averring what kind of publication, is bad for uncertainty, *quere*.

It is sufficient if the indictment alleges that the defendant knowingly deposited the obscene book, without alleging that he knew it to be non-mailable matter under the statute.

It was proper to exclude, on the trial, a question put to the defendant, as a witness, as to whether, at any time, in the sale or mailing of the book, he did it with a knowledge or belief that it was obscene.

The District Attorney having, at the trial, marked the particular portions of the book which he claimed to be within the statute, and having stated that he did not rely on any others, the Court properly refused to permit the counsel for the defendant to read to the jury any portions of the book except the parts so marked, unless they were in immediate connection, to qualify the parts so marked. The marked parts and the contexts of the same were read to the

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The United States v. Bennett.

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jury and commented on by the defendant's counsel in his summing up, and each one of the jurors had a copy of the book in his hand during the reading and took the same with him.

The Court properly refused to permit the defendant's counsel to read from other books clauses of alleged similar character, by way of illustration.

The Court properly charged the jury, that the test of obscenity, within the meaning of said statute, is, whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of the sort may fall.

The object of the use of the obscene words is not a subject for consideration.

The statute differs from no other criminal statute, so as to require a different rule as to a reasonable doubt, on the evidence.

During the absence of the jury, the Court sent to them by the officer in charge, and in the absence of the prisoner, after exhibiting the same to the counsel for the prisoner, a direction in writing that they might deliver a sealed verdict to said officer and then separate. They delivered a sealed verdict to said officer, and then separated. The next day they came into Court, and announced, by their foreman, that they had agreed on a verdict, and that he had handed a sealed verdict to said officer. The jury then rendered a verdict of guilty, as stated in such sealed verdict, which was received by the Court from said officer, in the presence of the defendant, and which was thereupon announced, and recorded, in open Court, as a verdict of guilty. The jury were then polled, at the request of the defendant, and each of the jurors answered, that the verdict announced was his verdict. The offence was, by the statute, declared to be a misdemeanor: *Held*, that no ground was shown for granting a new trial.

(Before BLATCHFORD, BENEDICT and CHOATE, JJ., Southern District of New York, May 31st, 1879.)

BLATCHFORD, J. The indictment against the defendant contains two counts. The first count avers, that the defendant, "on the twelfth day of November, in the year of our Lord one thousand eight hundred and seventy-eight, at the Southern District of New York, and within the jurisdiction of this Court, did unlawfully and knowingly deposit, and cause to be deposited, in the mail of the United States, then and there, for mailing and delivery, a certain obscene, lewd and lascivious book, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said book is so lewd, obscene and lascivious, that the same would be offensive to the Court here, and improper to be placed upon the records thereof; wherefore, the jurors aforesaid do not set forth the same in

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The United States v. Bennett.

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this indictment; which said book was then and there inclosed in a paper wrapper, which said wrapper was then and there addressed and directed as follows: G. Brackett, Box 202, Granville, N. Y." The second count avers, that the defendant, "on the twelfth day of November, in the year of our Lord one thousand eight hundred and seventy-eight, at the Southern District of New York, and within the jurisdiction of this Court, unlawfully and knowingly did deposit, and cause to be deposited, in the mail of the United States, then and there, for mailing and delivery, a certain publication of an indecent character, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said publication is so indecent that the same would be offensive to the Court here, and improper to be placed on the records thereof; wherefore, the jurors aforesaid do not set forth the same in this indictment; which said publication was then and there inclosed in a wrapper, which said wrapper was then and there addressed and directed as follows, to wit: G. Brackett, Box 202, Granville, N. Y." The defendant was tried at one of the exclusively criminal terms of this Court, held under the provisions of sections 613 and 658 of the Revised Statutes, by the District Judge for the Eastern District of New York. The jury rendered a verdict of guilty, and the defendant has moved for a new trial, on a case and exceptions, and also to set aside the verdict, and for an arrest of judgment upon the same, the motion being made at an exclusively criminal term, held under the same sections, by the Circuit Judge for the Second Judicial Circuit, and the District Judges for the Southern and Eastern Districts of New York.

Before the commencement of the trial, the counsel for the defendant moved the Court, that the case be remitted from this Court to the District Court for this District, so that the defendant might be there tried, and thereby acquire a right to the benefit of the Act of March 3d, 1879. (20 *U. S. Stat. at Large*, 354,) entitled "An Act to give Circuit Courts appellate jurisdiction in certain criminal cases." The Court denied the motion. The Act of 1879 provides, that "the

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The United States v. Bennett.

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Circuit Court for each Judicial District shall have jurisdiction of writs of error in all criminal cases tried before the District Court, where the sentence is imprisonment, or fine and imprisonment, or where, if a fine only, the fine shall exceed the sum of three hundred dollars." It then provides for the settlement of a bill of exceptions, and for the allowance of a writ of error, and for the affirmance or reversal, by the Circuit Court, of the judgment of the District Court, when it is a judgment against the defendant, in a criminal case. In this case, the sentence may be imprisonment or fine and imprisonment, or, if a fine only, the fine is to be not less than \$100, nor more than \$5,000. But, this indictment was found in this Court before the Act of 1879 was passed, and there is no provision of law whereby an indictment can be remitted by a Circuit Court to a District Court, unless the District Attorney deems it necessary. Such is the provision of § 1,037 of the Revised Statutes. Section 1,038 provides for the remission of an indictment from the District Court to the Circuit Court, when, in the opinion of the District Court, "difficult and important questions of law are involved in the case," but there is no provision under which a Circuit Court can, of its own motion, or on the application of the defendant, remit an indictment to a District Court.

The case states as follows: "The prosecution then proved the deposit, by the defendant, in the United States mail, for mailing and delivery, of the work entitled 'Cupid's Yokes, or The Binding Forces of Conjugal Life.' The counsel for the prosecution then announced that he had marked the passages in the work already in evidence, in its entirety, which he would read to the jury, and with the reading of those passages to the jury he rested on the part of the prosecution." The counsel for the prisoner thereupon moved for the discharge of the prisoner, on the following grounds, to wit: "1. That the statute under which this indictment has been presented is not warranted by, and is in contravention of, the Constitution of the United States, and is, therefore, without force and void. 2. That the indictment itself is defective,

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The United States v. Bennett.

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because it does not set out the whole pamphlet, nor localize in any way in it the matter alleged to be within the statute, nor the passages relied upon as obscene or of an indecent character, and which are now, for the first time, asserted as the grounds of this prosecution. 3. That the first count of the indictment is not sustained by the proof, for it avers the deposit of a *book*, whereas the proof shows a deposit of a *pamphlet*. This, under the statute, is a fatal variance. 4. The second count is also liable to a similar objection. It avers the deposit of 'a certain publication of an indecent character,' without further describing it, and the averment is not sustained by the evidence given. It is, therefore, void for uncertainty. 5. That the indictment does not allege an offence under the statute, in that it does not set forth that the said pamphlet is 'non-mailable' under said statute, and that it does not set out that the prisoner knew that the same was non-mailable, as is required by the statute, so as to constitute an offence thereunder." The Court denied the motion.

The statute under which this indictment proceeds is § 3,893 of the Revised Statutes, as amended by § 1 of the Act of July 12th, 1876, (19 *U. S. Stat. at Large*, 90.) It provides as follows: "Every obscene, lewd or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, \* \* \* are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post office, nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter \* \* \* shall be deemed guilty of a misdemeanor, and shall, for each and every offence, be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the Court." The question of the constitutionality of this statute, so far as the offences charged in this indictment are concerned, seems to us to have been definitely

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The United States v. Bennett.

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settled by the decision of the Supreme Court in *Ex parte Jackson*, (6 Otto, 727.) That decision related to a statute excluding from the mail letters and circulars concerning lotteries, but the views of the Court apply fully to the present case.

It is insisted that the book or publication alleged in the indictment to be obscene, lewd and lascivious or of an indecent character, should have been set forth *in haec verba* in the indictment, or that, at least, the passages in it relied upon as obscene or of an indecent character, should have been thus set forth. This is claimed, on the view, that the accused has a right to demand a precise statement, in the indictment, of all the facts constituting his alleged offence. The indictment proceeds on the ground, that, if it states that the obscene, lewd or lascivious book is so obscene, lewd and lascivious, or that the publication of an indecent character is so indecent, that the same would be offensive to the Court and improper to be placed on the records thereof, and that, therefore, the jurors do not set forth the same in the indictment, it is not necessary to set forth *in haec verba* the book or publication or the obscene or indecent parts of it relied on, provided the book or publication is otherwise sufficiently identified in the indictment for the defendant to know what book or publication is intended.

It is the law of England, as decided in *Bradlaugh v. The Queen*, (L. R., 3 Q. B. Div., 607,) by the Court of Appeal, that, in an indictment at common law, for publishing an obscene book, it is not sufficient to describe the book by its title only, but the words thereof alleged to be obscene must be set out, and, if they are omitted, the defect will not be cured by a verdict of guilty, and the indictment will be bad, either upon a motion in arrest of judgment, or upon a writ of error. This decision reversed, on a writ of error, that of the Queen's Bench Division in *The Queen v. Bradlaugh*, (L. R., 2 Q. B. Div., 569.) The indictment in that case identified the book only by its title, and it neither set forth the book nor any part of it, and it did not allege any reason for not setting

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The United States v. Bennett.

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forth the same. The conclusion arrived at by the Court of Appeal was, that, whenever the offence consists of words written or spoken, those words must be stated in the indictment, and, if they are not, it will be defective upon demurrer, or on motion in arrest of judgment, or on writ of error. The Court rejected the reason given for not setting forth on the record obscene libels, that the records of the Court should not be defiled by the indecency, and it pointed out, that, in order to bring the indictment before it within the American cases cited to it, referred to hereafter, it would have been necessary to aver that the libel was so indecent and obscene that it ought not to appear on the records of the Court.

In *Commonwealth v. Holmes*, (17 *Mass.*, 336,) the indictment was for an offence at common law—publishing an obscene print, in a book, and also for publishing such book. The second count did not set forth the book or any part of it, but alleged that it was so obscene that it would be offensive to the Court and improper to be placed on the records thereof, and that, therefore, the jurors did not set it forth in the indictment. The fifth count described the print. The defendant, after conviction, moved in arrest of judgment, because, in certain counts, no part of the book was set forth, and because, in certain other counts, the print was not so particularly described as it ought to have been, so that the jury might judge whether the same was obscene. The Court said: “The second and fifth counts in this indictment are certainly good, for it can never be required that an obscene book and picture should be displayed upon the records of the Court, which must be done if the description in these counts is insufficient. This would be to require that the public itself should give permanency and notoriety to indecency, in order to punish it.”

In *Commonwealth v. Tarbox*, (1 *Cushing*, 66,) the indictment was for a statutory offence—publishing and distributing a paper containing obscene language. The indictment set forth what it alleged to be the purport and effect of the paper

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The United States v. Bennett.

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and gave no excuse for not setting it forth *in haec verba*. The defendant, after conviction, moved in arrest of judgment, because the indictment did not profess to set out the words or tenor of the publication, but only its substance, and did not aver any reason or excuse for not setting out the words. The Court say: "In indictments for offences of this description, it is not always necessary that the contents of the publication should be inserted; but, whenever it is necessary to do so, or whenever the indictment undertakes to state the contents, whether necessary or not, the same rule prevails as in the case of libel, that is to say, the alleged obscene publication must be set out in the very words of which it is composed, and the indictment must undertake or profess to do so, by the use of appropriate language. The excepted cases occur whenever a publication of this character is so obscene as to render it improper that it should appear on the record; and then the statement of the contents may be omitted altogether, and a description thereof substituted; but, in this case, a reason for the omission must appear in the indictment, by proper averments. The case of *Commonwealth v. Holmes*, (17 *Mass.*, 336,) furnishes both an authority and a precedent for this form of pleading. In the present case, the indictment sets out the printed paper according to its purport and effect, and not *in haec verba*, or according to its tenor, or by words importing an exact transcript. The mode of pleading adopted cannot be sustained, and, the indictment being insufficient, judgment is arrested."

In *Commonwealth v. Sharpless*, (2 *Serg. & Rawle*, 91,) the indictment charged that the defendant "did exhibit and show for money to persons, to the inquest aforesaid unknown, a certain lewd, wicked, scandalous, infamous, and obscene painting, representing a man in an obscene, impudent and indecent posture with a woman." After a verdict against the defendant, a motion in arrest of judgment was made, on the ground that the picture was not sufficiently described in the indictment. On this point, Ch. J. Tilghman says: "We do not know that the picture had any name, and, therefore, it

might be impossible to designate it by name. What, then, is expected? Must the indictment describe minutely the attitude and posture of the figures? I am for paying some respect to the chastity of our records. These are circumstances which may be well omitted. Whether the picture was really indecent the jury might judge from the evidence, or, if necessary, from inspection. The witnesses could identify it. I am of opinion that the description is sufficient." The motion in arrest was overruled.

In *The People v. Girardin*, (1 *Michigan*, 91,) the indictment charged that the defendant printed and published "a certain wicked, nasty, filthy, bawdy and obscene paper and libel, entitled City Argus, in which said libel are contained, among other things, divers wicked, false, feigned, impious, impure, bawdy and obscene matters, language and descriptions, wherein and whereby are represented the most gross scenes of lewdness and obscenity," &c. After conviction, the defendant moved in arrest of judgment, on the ground that the obscene matter was not set forth in the indictment. The motion was overruled. The Court said: "There is another rule, as ancient as that contended for by the counsel for the prisoner, which forbids the introduction in an indictment of obscene pictures and books. Courts will never allow their records to be polluted by bawdy and obscene matters. To do this, would be to require a Court of justice to perpetuate and give notoriety to an indecent publication, before its author could be visited for the great wrong he may have done to the public or to individuals. And there is no hardship in this rule. To convict the defendant, he must be shown to have published the libel. If he is the publisher, he must be presumed to have been advised of the contents of the libel, and fully prepared to justify it. The indictment in this cause corresponds with the precedents to be found in books of the highest merit. If authority were necessary, the case of *Commonwealth v. Holmes*, (17 *Mass.*, 336,) fully sustains the views we have expressed."

In *The State v. Brown*, (1 *Williams*, 619,) the indictment

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The United States v. Bennett.

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was for selling an obscene publication, which was described in the indictment as "a certain lewd, scandalous and obscene printed paper, entitled 'Amatory Letters,' 'Ellen's Letter to Maria,' and 'Maria's Letter to Ellen,' which said printed paper is so lewd and obscene that the same would be offensive to the Court here, and improper to be placed upon the records thereof, wherefore, the jurors aforesaid do not set forth the same in this indictment." The defendant demurred to the indictment, but it was held sufficient. The Court, (Redfield, Ch. J.,) say: "Ordinarily, the indictment, in a case like the present, should set forth the book or publication *in haec verba*, the same as in indictments for libel or forgery. This seems to be an acknowledged principle in the books. But, even in indictments for forgery, it may be excused, as, if the forged instrument is in the possession of the opposite party. So, also, in a case like the present, if the publication be of so gross a character that spreading it upon the record will be an offence against decency, it may be excused, as all the English precedents show. Some of the precedents are much like the present, describing the obscene character of the publication in general terms. But, more generally, the nature of the publication is more specifically described. But, in both cases, the principle of the case is the same. If the paper is of a character to offend decency and outrage modesty, it need not be so spread upon the record as to produce that effect. And, if it is alleged, in such case, to be a publication within the general terms in which the offence is defined by the statute, it is sufficient, which seems to be done in the present case. The degree of particularity with which the paper could be described without exposing its grossness, would depend something upon the nature of that feature, whether it consisted in the words used or the general description given. In the former case, it could not be more particularly described than it here is, without offending decency."

In *McNair v. The People*, (8 *Central Law Journal*, 235,) the view of the Court was, that, if the obscene publication is in the hands of the defendant, or is not in the power of the

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The United States v. Bennett.

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prosecution, or the matter is too gross and obscene to be spread on the records of the Court, and the excuse for the failure to set out the obscene matter is averred in the indictment, the supposed obscene matter need not be set out in the indictment.

One Heywood was indicted in the District Court of the United States for the District of Massachusetts. The indictment contained two counts. The first count alleged that the defendant "did unlawfully and knowingly deposit, and cause to be deposited, in the mail of the United States of America, then and there, for mailing and delivery, a certain obscene, lewd and lascivious book, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said book is so lewd, obscene and lascivious that the same would be offensive to the Court here and improper to be placed upon the records thereof, wherefore, the jurors aforesaid do not set forth the same in this indictment, which said book was then and there enclosed in a wrapper and addressed as follows, that is to say: E. Edgewell, Squan Village, New Jersey, Box 49." The second count alleged that the defendant "did wilfully and unlawfully deposit, and cause to be deposited, in the mail of the United States of America, then and there, for mailing and delivery, a certain publication of an indecent character, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said publication is so indecent that the same would be offensive to the Court here and improper to be placed upon the records thereof, wherefore, the jurors aforesaid do not set forth the same in this indictment, which said publication was then and there enclosed in a paper wrapper and addressed as follows, that is to say: E. Edgewell, Box 49, Squan Village, New Jersey." The indictment was remitted to the Circuit Court, and the defendant was tried on it before Judge Clark, at the October Term, 1877, and convicted. Afterwards he filed a motion in arrest of judgment, in January, 1878, before sentence, on the ground that the Act of Congress under which the indictment was found, to wit, § 3,893 of the Revised Statutes, was unconstitutional,

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The United States v. Bennett.

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inoperative and void. In June, 1878, he filed a motion for leave to amend said motion in arrest, by assigning the additional cause, that "the indictment does not set out the book alleged to be obscene, lewd and lascivious and indecent, and the same is not made a part of said indictment." Both motions were heard before Mr. Justice Clifford and Judge Clark and were overruled, and the defendant was sentenced to pay a fine and be imprisoned.

No case in the United States has been cited where an indictment in form like the one in this case, for publishing or circulating or mailing an obscene or indecent publication, has been held defective, either on demurrer or on motion in arrest of judgment. In *Knowles v. The State*, (3 Day, 103,) the information alleged that the defendant exhibited a horrid and unnatural monster, highly indecent, unseemly, and improper to be seen or exposed, as a show. It stated no circumstances describing the appearance of the thing, and gave no excuse for omitting such description. It was held bad, on a motion in arrest of judgment. In *The State v. Hanson*, (23 Texas, 232,) the indictment alleged that the defendant "did publish an indecent and obscene newspaper called 'John Donkey,' manifestly designed to corrupt the morals of the youth of said county." The composition or print was not set out or described, nor was any excuse given in the indictment for failing to do so. The indictment was held bad, on exception. In *The People v. Hallenbeck*, (52 Howard's Pr. Rep., 502,) the indictment alleged that the defendant did utter, write and publish a certain obscene, lewd and indecent paper and writing, which said paper was enclosed in an envelope and deposited in the post office of the United States at said town of Catskill, for mailing and delivery, the said envelope being then and there addressed by the words following, that is to say: "Mrs. Mary T. Westmore, Catskill, N. Y." The indictment was demurred to. The Court held, that, as there was no description whatever of the alleged libellous writing, not even by its title, and not the slightest thing was mentioned by date, subject matter, expression,

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The United States v. Bennett.

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thought or word, which identified or described the alleged obscene writing, the indictment was bad.

For the rule that an indictment must state the facts which constitute the crime, three reasons have been assigned by the authorities: (1.) That the person indicted may know what charge he has to meet; (2.) That, if convicted or acquitted, he may with facility plead or prove a plea of *autrefois convict* or *autrefois acquit*; (3.) That he may take the opinion of the Court before which he is indicted, by demurrer, or by motion in arrest of judgment, or the opinion of a Court of error by writ of error, on the sufficiency of the statements in the indictment. As to the first two reasons, Lord Justice Bramwell says, in *Bradlaugh v. The Queen*, (*L. R.*, 3 *Q. B. Div.*, 616,) that "those two reasons may be disregarded, because an accused person is very rarely ignorant of the charge which he is called upon to meet, and no real difficulty exists as to pleading or proving a former conviction or acquittal," adding, however, that it was a very plausible observation, that, where the book as a whole is charged as an offence, the defendant cannot tell what passages will be selected as those on which the charge is to be supported. As to the third reason, the Lord Justice says, that, in his opinion, it is to this day substantial and cannot be disregarded.

As to being informed of the charge which he has to meet, so far as regards being furnished with a copy of the book or with a copy of the alleged obscene parts of it, a defendant can always procure such information by applying to the Court, before the trial, for particulars. In the present case, there is no complaint that such application was made and refused, and the case shows that, at the trial, immediately after the mailing of the book was proved, the counsel for the prosecution announced that he had marked the passages in the book which he would read to the jury, and then read them to the jury. The defendant made no claim that he was not until then advised what such passages were, or that he was prejudiced by not being until then so advised, nor did he move to delay the trial because not sooner advised of

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The United States v. Bennett.

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them ; and the Court afforded time for the examination of such marked passages and their contexts, by adjourning until the next day, before the counsel for the defendant commenced his summing up to the jury.

We are unable to recognize the force of the suggestion, that the defendant, in the case of an indictment for depositing an obscene book in the mail, is entitled to take the opinion of the Court by demurrer, as to whether the matter alleged to be obscene is obscene. The suggestion referred to has never been regarded, in the American cases, as of sufficient weight to lead to a following of the present English rule. The true view, we think, is, that if, in a case like the present one, any question can be raised to the Court, it can only be the question whether, on the matter alleged to be obscene, a verdict that it is obscene would be set aside as clearly against evidence and reason. This question can be fully raised before the trial, by a motion to be made on the indictment and a bill of particulars. Under all other circumstances, it is for the jury to say whether the matter is obscene or not. (See *Commonwealth v. Landis*, 8 *Phila.*, 453.)

In the present indictment, the defendant had information given to him as to the offence charged, by the date of the mailing, by the title of the book, and by the address on the wrapper. The indictment states the reason for not setting forth the book to be, that it is too obscene and indecent to be set forth. A copy of the book, with a designation of the obscene passages relied on, could have been obtained before the trial, by asking for a bill of particulars. The defendant was not deprived of the right "to be informed of the nature and cause of the accusation." The weight of authority, as well as of reasoning, is in favor of the sufficiency of the present indictment. (See *United States v. Foote*, 13 *Blatchf. C. C. R.*, 418.)

It is objected, that the publication in question is not a "book," as alleged in the first count of the indictment, but is a pamphlet of 23 pages. It consists of one sheet of 16 pages and a half sheet of 8 pages, secured together, making

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The United States v. Bennett.

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24 pages of white paper, with a cover of 4 pages of colored paper. It has a title page, which is page one of the white paper, and the title on such title page is printed identically on page one of the cover. Page 24 of the white paper and pages 3 and 4 of the cover are filled with advertisements. The case shows, that the defendant's counsel, on the trial, in his offers of evidence and in his questions to witnesses, called the publication in question a "book." He so called it in questions to the defendant as a witness. We think there is nothing in the objection.

It is also objected, that the second count does not state whether the publication is a book, a pamphlet, a picture, a paper, a writing, or a print, or what other publication than any one of those it is; and that it is bad for uncertainty. Whether the second count is good or not, the first count is good and sufficient to support the conviction.

It is also contended, that it is not sufficient for the indictment to allege that the defendant knowingly deposited the obscene book, but that it should aver that he knew the same to be non-mailable matter under the statute. We think the objection untenable. If the defendant knew what the book was which he was depositing, if he did not deposit it by mistake, or if he did not deposit it when he thought he was depositing another book, it is of no consequence that he may not have known or thought it to be obscene and so non-mailable, so long as it was, in fact, obscene, and he knew he was depositing the identical book complained of.

The defendant, as a witness at the trial, was asked, on direct examination: "Q. At any time, in the sale or mailing of this book, you may state whether you did it with a knowledge or belief that it was obscene?" On objection, the question was excluded. The propriety of such exclusion is manifest, as will appear from views to be presented hereafter, in connection with the charge and the defendant's requests to charge.

At the close of the testimony, the counsel for the defendant offered to read to the jury the whole book in question,

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The United States v. Bennett.

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and the District Attorney objected to the reading of the whole book. The District Attorney had marked the particular portions of the book which he claimed to be within the statute, and stated that he did not claim that any portions of the book, except those which were marked, brought it within the scope of the statute. The Court said: "I do not feel called upon to permit the reading of any portions of the book, except the parts marked, unless it be in immediate connection, to qualify that particular portion of the book. The general scope of the book is not in issue. I, therefore, shall confine the counsel to those parts that the Government has marked. If counsel on the part of the defence think proper to read them to the jury, I do not forbid that, and I allow any latitude of comment upon those portions; but, as to the rest of the book, in my opinion, there is no occasion for its being read. When counsel reach that stage where it is proper to sum up the case, portions of it may be read then. The jury shall have the whole book, but the necessity of reading the whole book is not apparent, and I am inclined to forbid it, and give you an exception. If there is any particular sentence necessary to make the sense and meaning of a passage clear, I intend to allow you to read that." To this ruling the defendant's counsel excepted. The case afterwards says: "The counsel then proceeded, under permission of the Court, to read, and to comment to the jury upon, each of the passages marked, as relied upon by the prosecution, and the context of the same. The passages relied upon by the prosecution, and read and commented on by the prisoner's counsel, are marked and numbered with black ink, in the Exhibit 'Cupid's Yokes' herewith submitted to the Court, and the contents of the same, read by the prisoner's counsel, are indicated by red ink, and are at pages 1, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and each one of the jurymen had a copy of the book in his hand during the reading, and took the same with him." The case elsewhere states, that the Court allowed the counsel for the defendant to read and comment on the contexts of the passages marked by the prose-

cution, so far as to show the meaning of the language of the marked passages. So far as the case shows, the counsel for the defendant was, under this ruling, left entirely free to select and read everything which he thought would show the meaning of the language of the marked passages, except that, after reading the last passage marked by the prosecution, marked 22, he offered to read to the jury the last page of the book, page 23, and, on objection, the Court refused to permit it to be read, and the defendant excepted. It is entirely clear, that the page so excluded contained nothing which shows the meaning of the language of any passage marked by the prosecution. We do not perceive that the defendant was deprived of any right or privilege to which he was entitled. The jurors had each of them a copy of the whole book, and the parts which the defendant's counsel was excluded from reading and commenting on, were parts which, under the law applicable to this case, may properly be regarded as not being in the book.

In commenting on one of the passages which he read, the counsel for the defendant stated that he desired to read from another book, a clause of a similar character, by way of showing "how that sort of illustration or expression or narrative is regarded in standard literature." The Court excluded all reference to, and illustrations from, other books and publications, and the defendant's counsel excepted. We are unable to see that there was any error in their exclusion. It is the duty of the Court to prevent the presentation to the jury of any issues other than the one on trial, and it did not tend to show that the marked passage in question was not obscene, that another passage in the book from which the marked passage was quoted, or another passage in some other book, was not generally accepted as obscene.

The foregoing are all the matters occurring prior to the requests to charge, in respect to which error is alleged, in the argument of the defendant's counsel.

Prior to the charge to the jury, the following requests to charge were made by the defendant and were refused by

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The United States v. Bennett.

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the Courts, except as they agree with its charge and rulings as made: "(1.) That, by the word *obscene* is meant, 'that which openly wounds the sense of decency,' by exciting lust or disgust. That, by *indecent* is meant, the wanton and unnecessary expression or exposure, in words or pictures, of that which the common sense of decency requires should be kept private or concealed. That, where words which might otherwise be obscene or indecent, are used in good faith, in social polemics, philosophical writings, serious arguments, or for any scientific purpose, and are not thrust forward wantonly, or for the purpose of exciting lust or disgust, they are justified by the object of their use, and are not obscene or indecent, within the meaning and purpose of the law. (2.) That none of the words used in the parts of the essay in question relied upon by the prosecution are, by and of themselves, necessarily obscene or indecent; that all of said words are well known and common words of the English language, and may be properly used as such, and are not within the meaning and purpose of the law, unless wantonly and unnecessarily used, so as to offend the sense of decency. (3.) That the true character of these words, and whether they are obscene or not, must be determined by their context, and by the scope and purpose of the whole essay, and by the jury. That any of the words objected to, which may at first seem to be unnecessarily used, are not within the law, if reasonably required by the argument and the context, and if they were plainly so used by the author. (4.) That, because some of the words and sentences used may be, from certain points of view, or generally, immodest, indelicate, impolite, unbecoming, blasphemous, irreligious, immoral, and bad in their influence upon society, such words and sentences are not, therefore, necessarily obscene, and do not make the essay obscene, within the intent of the law, nor under this indictment. (5.) That the whole scope of the essay and the purposes and intent of the author must be considered, before it is found that the words and sentences claimed to be objectionable bring it within the meaning and purpose of the law. That, if the general

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The United States v. Bennett.

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intent and purpose of the essay was not to make an obscene or indecent publication, the passages relied upon by the prosecution do not necessarily make it so. (6.) That the fact, that the words and sentences claimed to be obscene, or similar ones, are, and have been for years, in common use in scientific, polemic, or controversial writings, and in reformatory and general literature, is to be considered by the jury, in determining whether they are used in this essay so as to be really an offence under the law or not, and that such use affords a strong presumption that they are not within the law. (7.) That, when the words and sentences claimed to be obscene are used in a social polemic, the necessity and propriety of their use in a work of that character should be considered by the jury, and, if they appear to have been used by the author in good faith, for the purposes of the polemic, and not wantonly, for the purpose to offend decency or to excite lust or disgust, they do not constitute an offence under the statute. (8.) That, although it may appear certain to the jury, that the doctrines and sentiments of the passages relied upon by the prosecution, or of the whole essay, would be injurious to the community, or destructive to society, if generally practiced, yet, if said words and sentences were used by the author in good faith, to properly and reasonably set forth his mistaken and wicked doctrines and sentiments, and not wantonly or unnecessarily, to offend decency or to excite lust or disgust, such words and sentences are not within the law. In no case should the jury be influenced by the effect which, in their judgment, those mistaken and wicked doctrines and sentiments might have upon morals, or society, or the family, or religion, or the welfare of the community, if brought into general practice. (9.) That, this statute, being in derogation of the common law, and restrictive of the liberties of the citizen, and of a highly penal character, should be strictly construed, in cases of this kind. (10.) That, when, in cases under this law, doubts and uncertainties arise as to the meaning and intentions of the words objected to, or in construing them with the context, or if there are difficulties in applying the

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The United States v. Bennett.

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definitions given by the Court, all reasonable doubts, uncertainties and difficulties are to be resolved by giving the accused the benefit of them."

'The Court then charged the jury as follows: "The statute under which the defendant is indicted provides, that 'every obscene, lewd, or lascivious book or pamphlet, picture, paper, writing, print, or other publication of an indecent character' is non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post office, nor by any letter-carrier; and that any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything so declared to be non-mailable matter, shall be guilty of an offence, and liable to the punishment stated. The object of this statute was to prevent the employment of the mails of the United States for the purpose of disseminating obscene literature. The necessity of such a statute is obvious to any person who has paid attention to the facts. If you think what the United States mails are, how they are protected by the law, where they go, the secrecy attending their operations, you will at once see, that, for the distribution of matter of any kind upon paper, there is no other engine of equal power. It is the machine best adapted to the dissemination of obscene literature, because of the fact that it reaches every person, and letters delivered by the mail can be received in secret by the person to whom they are addressed, whether in their own or in fictitious names. For this reason the mails have been used, and the extent to which they have been used for that purpose is appalling to one acquainted with the facts. These facts have been made known to the Congress of the United States, the Government of the United States alone being charged with the carrying of the mails, and it being competent for the Congress of the United States to say what shall be and what shall not be carried in the mails, whereupon Congress declared that obscene matter should not be so carried. Nobody can question the justice, the wisdom, the necessity of such a statute. This statute does not undertake to regulate the publication of matter. Matter of any kind

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The United States v. Bennett.

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may be published, and not violate this law. It does not undertake to regulate the dissemination of obscene matter. Such matter may be sent by express, without violating any law of the United States. But, what the United States Government says is, that the mails of the United States shall not be devoted to this purpose. It is a law to protect the community against the abuse of that powerful engine, the United States mail. The constitutionality of the law is not a question here. The statute is the law of the land, and it is to be enforced by the Courts, to be obeyed by the citizens. Under this statute, this defendant is charged with having deposited in the mail an obscene book or publication. There has been some talk about who made the complaint. But, who made the complaint which caused this prosecution to be instituted is a matter of no consequence to you or to me. The motives of the person who made the complaint are not material here. Most infractions of law are discovered and punished by reason of hostility or enmity on the part of some person in the community against some other person. But that does not affect the question of the guilt or innocence of the party accused, when he is properly accused under the law. So, you will dismiss from your consideration the question whether Mr. Comstock has hostile feelings against this man, or not. It makes no difference whether he has or has not. The prosecution is not his. It is the prosecution of the United States. Under our form of criminal procedure, a prosecution must be endorsed by the District Attorney, an officer selected under the law, as a public prosecutor. There is not such an officer in all countries. In England, I think, to this day, there is no public prosecutor, which accounts, perhaps, for the happening of such an event as was alluded to by the counsel, in the case of Shelley's works. But here there is a public prosecutor, and he must entertain the complaint and present it to the grand jury. The grand jury, under their oaths, must find it a case proper to be presented to a petit jury; and that has been done in this case. Whether it is wise to institute such prosecutions or not, is not a question for you or for me. You are not the

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The United States v. Bennett.

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District Attorney; you have not the responsibility of the District Attorney upon you; and it is not likely that you will be willing to assume that responsibility, by deciding any case like this upon the question whether the effect of such a prosecution will be good or ill. Your duty in this case, under your oaths, can only be discharged by rendering a verdict according to the facts proven. The facts belong to you; the questions of law belong to the Court. You will not undertake, therefore, to speculate upon the construction of the law, but leave that responsibility upon the Court, where it belongs. You will consider the facts, for, your responsibility is a responsibility in regard to the facts of the case. I do not intend, in my remarks, to convey to you my opinion of the questions of fact involved. I intend to leave you, upon your oaths and your responsibility, to say what are the facts here, and to render the verdict which the facts may require. This is not a question of religion, nor a question of the freedom of the press. There is no such question involved in this prosecution. This defendant may entertain peculiar views on the subject of religion; he may be an infidel; he may have peculiar and improper notions on the marriage relation; he may be a freethinker; he may be whatever he pleases; that should have no effect upon your deliberations. Whatever may be his beliefs or opinions, he is entitled here to a verdict at your hands, impartially, upon the simple fact involved in this case, and upon no other fact. If you should find a verdict against this man because you do not like his doctrines in respect to religion, if you should find a verdict against him because you do not like attacks on the marriage relation, you would do injustice to the man, and to the community also, for the community has no other interest than to have criminal cases decided correctly according to the law, and impartially upon the facts. But, if you should find that this book is an obscene book, he having deposited it, and you nevertheless acquit him because of any opinion you may have in harmony with his doctrines or beliefs, you would be equally guilty of an injustice. You are not, therefore, called upon by your verdict to

express your opinion in regard to any doctrines alluded to in this publication. All men in this country, so far as this statute is concerned, have a right to their opinions. They may publish them; this man may entertain the opinions expressed in this book, or he may not. Freelovers and freethinkers have a right to their views, and they may express them, and they may publish them; but they cannot publish them in connection with obscene matter, and then send that matter through the mails. If, in the discussion of any doctrine, any man uses obscene matter, he cannot send it through the mails of the United States, without violating the law. Of course, freedom of the press, which, I think, was alluded to, has nothing to do with this case. Freedom of the press does not include freedom to use the mails for the purpose of distributing obscene literature, and no right or privilege of the press is infringed by the exclusion of obscene literature from the mails. That this man mailed this book is proved, and not controverted; that he knew what the book was that he mailed is not controverted. The statute has the word 'knowingly.' That means that the man must know what book he deposited. A boy might be sent with an obscene book wrapped in a paper, and he might deposit it in the mail, and he would not be guilty under this statute, for it says, 'knowingly;' but, when a man deposits in the mail a book, if he knows what the book is, then he has made a deposit knowingly, within the statute. You could have no question about that, it not being controverted that this man mailed this book, and that he knew what book he was mailing. The only question, therefore, which you are called upon to decide, is, whether or not the book is obscene, lewd or lascivious, or of an indecent character. Now, you have had this book in your hands, and the District Attorney has marked certain passages. He does not claim that any passages in that bring it within the statute, except those marked, and, therefore, you may confine your attention to the marked passages, as the matter which you are to determine upon. It is upon those passages alone that this case must turn. There has been some discussion in this case, tending

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The United States v. Bennett.

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in the direction of the argument, that, if the general scope of the book was not obscene, the presence of obscene matter in it would not bring it within this statute. Such is not the law. If this book is, in any substantial part of it, obscene, lewd, lascivious, or of an indecent character, then it is non-mailable under this statute and the defendant is guilty. Any other rule of law would render the statute nugatory. If a person should write an essay upon the subject of honesty, and fill it with notes containing filthy and obscene stories, and could then pass it through the mails on the ground that it was an essay on honesty, the way would be easy to a disregard of the statute. So, I again charge you, that the general scope of this book is not the matter in hand, but the question is, whether those marked passages are obscene or indecent in character. There are, in the language, words known as words obscene in themselves. It is not necessary, in order to make a book obscene, that such words should be found in it. The most obscene, lewd, and lascivious matter may be conveyed by words which in themselves are not of an obscene character. The question is as to the idea which is conveyed in the words that are used, and that idea characterizes the language. As I have stated, the object with which this book is written is not material, nor is the motive which led the defendant to mail the book material. The effect likely to be produced by this matter which was in the book is the question for you. A man might—I mention this by way of illustration only—a man might conclude that it would be the best way to promote honesty and purity to bind together in a single book all the obscene stories that could be found—and we may imagine a person to honestly entertain the belief that that course would be the best way to excite disgust and so to prevent vice—he might honestly entertain that view and be as good a man as any man in the community, yet, if he published such a book and concluded to disseminate it through the mails, he would be a violator of this statute. The question is, whether this man mailed an obscene book; not why he mailed it. His motive may have been ever so pure; if the book he mailed was obscene, he is guilty. You see, then, that

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The United States v. Bennett.

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all you are called upon to determine in this case is, whether the marked passages in this book are obscene, lewd or of an indecent character. Now, I give you the test by which you are to determine the question. It is a test which has been often applied, and has passed the examination of many Courts, and I repeat it here, as the test to be used by you. You will apply this test to these marked passages, and if, judged by this test, you find any of them to be obscene, or of an indecent character, it will be your duty to find the prisoner guilty. If you do not find them, judged by this test, to be obscene, or of an indecent character, it will be your duty to acquit him. This is the test of obscenity, within the meaning of the statute: It is, whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall. If you believe such to be the tendency of the matter in these marked passages, you must find the book obscene. If you find that such is not the tendency of the matter in these marked passages, you must find the book not obscene, and acquit the prisoner. The statute uses the word 'lewd,' which means, having a tendency to excite lustful thoughts. It also uses the word 'indecent.' Passages are indecent within the meaning of this Act, when they tend to obscenity—that is to say, matter having that form of indecency which is calculated to promote the general corruption of morals. Now, gentlemen, I have given you the test; it is not a question whether it would corrupt the morals, tend to deprave your minds or the minds, of every person; it is a question whether it tends to deprave the minds of those open to such influences and into whose hands a publication of this character might come. It is within the law if it would suggest impure and libidinous thoughts in the young and the inexperienced. There has been some comment on the fact, that, in many libraries you may find books which contain more objectionable matter, it is said, than this book contains. It may be so; it is not material here. When such books are brought before you, you will be able to determine whether it is lawful to mail them or not. Here, the question is with

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*The United States v. Bennett.*

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reference to this book ; and it is of no importance how many books of worse character this man, or that man, or the other man, has, or whether the tendency of those books is worse or better than this book. The question is, the tendency of this book. If you find that the tendency of the passages marked in this book is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall, it is your duty to convict the defendant, notwithstanding the fact that there may be many worse books in every library of this city. Now, gentlemen, I have endeavored to bring you down, in your examination of this case, to the precise point. This is a question, as I have before stated, for you alone ; the responsibility is upon you, and upon each of you, to say, upon your oaths, after an examination of those passages, what the tendency of those passages is, and whether they have that tendency which I have described to you as necessary to be found in order to bring it within this statute. The statute is an important statute ; it is a statute to be enforced in all proper cases ; it is not a statute to be strained ; it is not a statute for twelve men to refine upon. The question which I have stated to you calls for good judgment—one to be submitted to the intelligent judgment of twelve intelligent men, who should judge sensibly, not straining points, when they determine what the tendency of the matter in this book is. It is a criminal case, and the defendant is entitled to the benefit of a reasonable doubt. You are bound to be satisfied beyond a reasonable doubt, that the tendency of this matter is such as I have described. This must not be a fancy. By a reasonable doubt is meant a doubt arising from the want of evidence. As to what the book contains, there is no dispute ; and you must be satisfied in your own minds, satisfied clearly, so that you are willing to say on your oaths that you believe, that the tendency of the matter in those marked passages is such as I have described. If you believe such to be the tendency of this matter, then you must find the book non-mailable and the prisoner guilty. If you are not satisfied

beyond a reasonable doubt, that the tendency of this matter is such as I have described to you, then it is your duty to give him the benefit of that doubt and acquit him."

At the close of the charge, the defendant requested the Court to charge the jury, in addition, as follows: "That the jury are the final judges of the law and fact in this case, and that the definitions charged by the Court are not conclusive upon them. That the Court should make no absolute test or definition of the words of the statute, and that the test and definitions made and submitted to the jury by the Court are advisory, and not authoritative or conclusive upon them."

The defendant also objected to the definitions given, and excepted to each of them in detail, and also excepted to each and every part of the charge, rulings and directions of the Court contrary to or inconsistent with the foregoing requests, and to the refusal of the Court to charge the same.

It is contended, that the Court erred in what it said to the jury as to the test of obscenity within the meaning of the statute; that it substituted the stated test for the words of the statute; that the stated test was, as a definition, erroneous, and was not a definition of obscenity; that it was a definition of an effect and not of the word "obscenity;" that, because an essay tends to deprave and corrupt the morals of society, it does not follow that it is obscene; that, while all obscenity tends to immorality, all immorality is not obscenity; and that essays on the drama, gluttony, inebriety, gaming, cock fighting, horse racing, polygamy, divorce or blasphemy, advocating or palliating any of them, might tend "to deprave and corrupt the morals of those whose minds are open to such influences and into whose hands a publication of this sort may fall," but they would not necessarily be obscene. It is a mistake to suppose, that, in what the Court said as to the test of obscenity, it intended to give to the jury a definition of "obscenity." The dictionary says, that "obscene" means, "offensive to chastity and decency; expressing or presenting to the mind or view something which delicacy, purity and decency forbid to be exposed." The statute and the

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The United States v. Bennett.

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indictment both use the word "obscene" without affixing to it any definition. In the first request to charge made before the charge was given, the defendant requested the Court to charge that the word "obscene" and the word "indecent" mean severally what is set forth in such request. The Court refused so to charge except as such request agreed with its charge. There is nothing in the charge which is contrary to the substance of such request. On the contrary, after using, in the course of the charge, the words "obscene," "lewd," "lascivious" and "indecent," as being words whose meaning the jurors, as intelligent men, fully understood, and as being words needing, therefore, no definition to be given of them by the Court to the jury, the Court defines the word "lewd," as used in the statute, (it being also used in the first count of the indictment,) as meaning "having a tendency to excite lustful thoughts." The Court did not define the word "lustful" any more than the first request to charge defined the word "lust," or the words "sense of decency." The Court then defined the word "indecent," as used in the statute, (it being also used in the second count of the indictment,) as meaning "tending to obscenity"—"having that form of indecency which is calculated to promote the general corruption of morals." This does not mean any other form of indecency calculated to promote the general corruption of morals, than the obscene form; because, the Court immediately proceeds to say, that, in what it had said about corrupting morals, it had been speaking of corrupting the morals and depraving the minds of those "open to such influences," that is, the influences of "obscene" matter, and that it meant thereby matter which would "suggest impure and libidinous thoughts in the young and inexperienced." It did not define the word "impure" or the word "libidinous" any more than the first request to charge defined the word "lust" or the words "sense of decency."

In saying that the "test of obscenity, within the meaning of the statute," is, as to "whether the tendency of the matter is to deprave and corrupt the morals of those whose minds

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The United States v. Bennett.

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are open to such influences, and into whose hands a publication of this sort may fall," the Court substantially said, that the matter must be regarded as obscene, if it would have a tendency to suggest impure and libidinous thoughts in the minds of those open to the influence of such thoughts, and thus deprave and corrupt their morals, if they should read such matter. It was not an erroneous statement of the test of obscenity, nor did the Court give an erroneous definition of obscenity, or a definition different from that of the first request to charge. It gave a definition substantially agreeing with that of such request.

In *Regina v. Hicklin*, (*L. R.*, 3 *Q. B.*, 360,) the question arose as to what was an "obscene" book, within a statute authorizing the destruction of obscene books. The book in question was, to a considerable extent, an obscene publication, and, by reason of the obscene matter in it, was calculated to produce a pernicious effect, in depraving and debauching the minds of the persons into whose hands it might come. It was contended, however, that, although such was the tendency of the book upon the public mind, yet, as the immediate intention of the person selling it was not so to affect the public mind, but to expose certain alleged practices and errors of a religious system, the book was not obscene. As to this point, Ch. J. Cockburn said: "I think, that, if there be an infraction of the law, the intention to break the law must be inferred, and the criminal character of the publication is not affected or qualified by there being some ulterior object in view, (which is the immediate and primary object of the parties,) of a different and an honest character. It is quite clear, that the publishing an obscene book is an offence against the law of the land. It is perfectly true, as has been pointed out by Mr. Kydd, that there are a great many publications of high repute in the literary productions of the country, the tendency of which is immodest, and, if you please, immoral, and, possibly, there might have been subject-matter for indictment in many of the works which have been referred to. But it is not to be said, because there are in many standard and estab-

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The United States v. Bennett.

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lished works objectionable passages, that, therefore, the law is not as alleged on the part of this prosecution, namely, that obscene works are the subject-matter of indictment; and I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character." These views seem to us very sound. In the present case, the remarks made by the Court, in its charge, as to the test of obscenity, were made in reference to suggestions like those made in the *Hicklin* case. It was contended, that the motive and object of the book were material. On this question the Court said: "The question is, whether this man mailed an obscene book; not why he mailed it. His motive may have been ever so pure; if the book he mailed was obscene, he is guilty. You see, then, that all you are called upon to determine in this case is, whether the marked passages in this book are obscene, lewd, or of an indecent character. Now, I give you the test by which you are to determine this question. It is a test which has been often applied, has passed the examination of many Courts, and I repeat it here, as the test to be used by you. You will apply this test to these marked passages, and, if, judged by this test, you find any of them to be obscene or of an indecent character, it will be your duty to find the prisoner guilty. If you do not find them, judged by this test, to be obscene or of an indecent character, it will be your duty to acquit him. This is the test of obscenity, within the meaning of the statute: It is whether, &c." The test there stated is substantially the same as that stated by Ch. J. Cockburn. The words "charged as obscenity," and the word "immoral" used by Ch. J. Cockburn, are dropped, and the words "the morals of," are not used by Ch. J. Cockburn. But the meaning of the two sentences is identical. The case of

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The United States v. Bennett.

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*Regina v. Hicklin*, was approved in *Steele v. Brannan*, (*L. R.*, 7 *C. P.*, 261,) where Ch. J. Bovill states that he fully concurs in the decision in *Regina v. Hicklin*.

In the case against Heywood, before referred to, the defendant was the writer of the book, and the book was the same book which is in question in the present case. In the trial of the Heywood case, Judge Clark, in charging the jury said: "A book is obscene which is offensive to decency. A book, to be obscene, need not be obscene throughout the whole of its contents, but, if the book is obscene, lewd, or lascivious or indecent in whole or in part, it is an obscene book, within the meaning of the law, a lewd and lascivious and indecent book. A book is said to be obscene which is offensive to decency or chastity, which is immodest, which is indelicate, impure, causing lewd thoughts of an immoral tendency. A book is said to be lewd which is incited by lust, or incites lustful thoughts, leading to irregular indulgence of animal desires, lustful, lecherous, libidinous. A book is lascivious which is lustful, which excites or promotes impure sexual desires. A book is indecent which is unbecoming, immodest, unfit to be seen. A book which is obscene, as I have said to you before, or lewd, or lascivious, or indecent, in whole or in part, or in its general scope or tendency, in its plates or pictures, or in its reading matter, falls within the scope of the prohibition of the statute. \* \* \* An argument has been made here to show you that Mr. Heywood was a moral man, a well-behaved man, and that his design in publishing this work was a good one, that he really believed the doctrines which he taught. But the Court say to you, that, such an argument cannot be received and considered by you, and cannot make any difference in the question of guilt or innocence. A man might believe that obscene things may be and ought to be corrected, and he might argue against them and publish for this purpose; but still the book might not be allowed to go through the mails, if obscene in itself. It is not the design. There is no reference in the statute to the design that a man has in putting the book in the mail, whether for

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The United States v. Bennett.

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a bad or a good purpose; but the law says, explicitly, that such books shall not go through the mails, and that, if anybody deposits them, he is to be punished for it. There is no question here in regard to the suppression or the spread of knowledge. \* \* \* Something was said in regard to other books—that these books are no more offensive than some other books, but you are not sent here to try other books, nor to compare this book with other books, and, you heard the Court rule out all other books. The sole question is, whether these books are obscene, lewd, or indecent. Other books may be so, or may not be so. They may or may not have gone in the mail. \* \* \* Observations were made in regard to the extent to which these books might be obscene, lewd, lascivious or impure, or might excite unlawful or impure desires; and it was said to you, that you might read these books, and they would excite no impure desire in you, no impure thought; but that is not a sure criterion, by any means. These books are not sent ordinarily to such people as you. But you may consider whether they are obscene, or lewd, or lascivious to any considerable portion of the community, or whether they excite impure desires in the minds of the boys and girls or other persons who are susceptible to such impure thoughts and desires. If any other standard were adopted, probably no book would be obscene, because there would be some men and women so pure, perhaps, that it would not excite an impure thought; but it is to be governed by its effect upon the community—whether it is obscene and is of dangerous tendency in the community generally, or any considerable portion of the community.” These views are, in substance, those contained in the charge in the present case.

We are of opinion that there was no error in what was charged by the Court as to the test of obscenity.

No other part of the charge was specifically complained of in the argument; but it was urged that the Court erred in refusing to charge as requested in the second paragraph of the first request, and in requests 2, 3, 4, 5, 6, 7, 8 and 9.

As to the second paragraph of the first request, we are of

opinion that the object of the use of the obscene or indecent words is not a subject for consideration. In addition to the observations already cited from the case of *Regina v. Hicklin*, Ch. J. Cockburn says, further: "May you commit an offence against the law in order that thereby you may effect some ulterior object, which you have in view, which may be an honest or even a laudable one? My answer is, emphatically, no. The law says, you shall not publish an obscene work. An obscene work is here published, and a work the obscenity of which is so clear and decided, that it is impossible to suppose that the man who published it must not have known and seen that the effect upon the minds of many of those into whose hands it would come, would be of a mischievous and demoralizing character. Is he justified in doing that which clearly would be wrong, legally as well as morally, because he thinks that some greater good would be accomplished? \* \* \* I hold, that, where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act; and that, as soon as you have an illegal act thus established, quoad the intention and quoad the act, it does not lie in the mouth of the man who does it to say: 'Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose.' " In *Steele v. Brannan*, (*before cited*,) it was contended, that the book treated of a matter which might properly be the subject of discussion and controversy, and that the object of those who put it forward was not only innocent but praiseworthy, inasmuch as they intended thereby to advance the interests of religion and of the public, and that, therefore, the book was not obscene. The Court held otherwise, and approved the ruling in the *Hicklin* case. The views of Judge Clark, to the same effect, have been quoted.

As to request 2, it was charged in substance, so far as its propositions are correct. The rest of it falls within what has been said as to the last paragraph of the first request. This last observation applies also to request 3.

As to request 4, its substance was charged, and, as to any-

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The United States v. Bennett.

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thing in it not charged, there was no error in not charging it.

The observations made as to the last paragraph of the first request apply, also, to requests 5, 6 and 7, and the first paragraph of request 8.

The last paragraph of request 8 was, in substance, charged.

We perceive no error in the refusal to charge as requested in request 9. This statute differs from no other criminal statute, and the jury were properly instructed on the subject of a reasonable doubt.

We have given no attention to any exceptions appearing in the case, which are not presented in the printed brief of the counsel for the defendant.

The case contains the following statement: "During the absence of the jury, the Court sent to them by the officer in charge, and, in the absence of the prisoner, after exhibiting the same to the counsel for the prisoner, a direction in writing, that they might deliver a sealed verdict to said officer, and that thereupon they should be allowed to separate and directed to appear in Court at the hour of the opening of the Court on the next day. At about 6.30 o'clock the next morning, (March 21st, 1879,) the jury delivered a sealed verdict to the officer, and were thereupon allowed by him to separate. The Court resumed its session at 11 o'clock A. M. of that day, and the jury, having been called by the clerk, announced, by their foreman, that they had agreed upon a verdict, and that he had handed a sealed verdict to the officer in charge of them. The counsel for the prisoner duly excepted to the direction of the Court that the jury should bring in a sealed verdict at all, and to the reception by the Court of such a verdict from the officer, and also to the right of the jury to separate at all until they had rendered their verdict in open Court. Under these exceptions the jury were allowed to render a verdict of guilty, as stated in the sealed verdict received by the Court from the officer, in the presence of the defendant, and which was thereupon announced and recorded in open Court, as a verdict of guilty. The counsel for

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The United States v. Bennett.

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the prisoner then and there requested that the jury be polled, which was done, and thereupon each of the jurymen, to the question of the clerk, whether the verdict announced was his verdict, answered in the affirmative." It is contended for the defendant, that the direction of the Court to the jury, in the absence of the prisoner, and without his consent, that they might deliver a sealed verdict to the officer in charge and then separate, and their doing so, is ground for a new trial. The propositions urged to this end are, that sealed verdicts have no authority in law without the prisoner's consent; that they have been introduced with great reluctance and great suspicion in civil cases, and are always a source of danger; that the separation of juries in criminal cases, after the charge of the Court, is always a recognized source of danger to the prisoner, to which the law does not voluntarily expose him; that the prisoner cannot prove a negative, to show that he has not been injured; that the direction of the Court is no justification or protection; that an instruction to the jury, that, after a long confinement, they may obtain a much desired release by a sealed verdict, is a direct inducement to the minority of the jury to yield against the prisoner, and was effective against him in this case; that the absence of authority for the course pursued upon this trial, and the reluctance with which any separation, before or after the charge, is allowed, is conclusive for the prisoner, on this point; and that, while the rule has been somewhat relaxed from necessity only, this has never been done so as to allow of a sealed verdict and a general separation of the jury, without the prisoner's presence, knowledge and consent, before their real verdict should be rendered in Court and in the prisoner's presence.

It appears, by the case, that the direction in writing to the jury, that they might deliver a sealed verdict to the officer and might then separate, was exhibited to the counsel for the prisoner before it was sent to the jury by the Court; that the jury strictly followed such direction; that the Court received the sealed verdict from the officer the next morning, in the presence of the jury and of the defendant, in open Court,

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The United States v. Bennett.

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after the jury had then and there announced that they had agreed upon a verdict and that such sealed verdict contained it; that the verdict of guilty announced and recorded was the verdict contained in such sealed verdict; and that, on the polling of the jury, at the request of the counsel for the defendant, each juror stated that the verdict announced was his verdict.

It is laid down in *Wharton's Criminal Law*, (6th ed., § 3,125,) that, "in misdemeanors, there is no difficulty, in practice, in permitting the jury to separate during the trial." In the present case, the statute expressly declares the offence to be a misdemeanor. Wharton cites the leading case of *Rex v. Woolf*, (1 *Chitty*, 401,) where it is held, that, in a case of misdemeanor, the dispersion of the jury does not vitiate the verdict. The dispersion referred to is one before agreement on a verdict. *A fortiori*, a dispersion after agreement, and after the verdict is written and signed and sealed up, and where the jury afterwards attend in Court with it, and the Court receives and opens it, and the jury give an oral verdict in accordance with it, on being polled, does not vitiate the trial. In *The People v. Douglass*, (4 *Cowen*, 26,) it is laid down, that the mere separation of a jury is not a sufficient cause for setting aside a verdict either in a civil or a criminal case, if there be no farther abuse. In *The People v. Ransom*, (7 *Wendell*, 417, 424,) it is said, that any irregularity or misconduct of the jurors will not be a sufficient ground for setting aside a verdict, either in a criminal or a civil case, where the Court are satisfied that the party complaining has not, and could not have, sustained any injury from it. In *The Commonwealth v. Carrington*, (116 *Mass.*, 37,) the question arose, whether, in a criminal case, not capital, the jury may be authorized by the Court, without the consent of the defendant, to separate after agreeing upon, signing and sealing up a paper in the form of a verdict, and afterwards return a verdict in open Court, in accordance with the result so stated and sealed up. It was held, that such a course is proper. The Court say: "The tendency of modern decisions has been

to relax the strictness of the ancient practice which required jurors to be kept together from the time they were empanelled until they returned their verdict, or were finally discharged by the Court. In civil cases the jury are never kept together at the intermissions of the sittings of the Court pending the trial; and it is well settled, that, after the case is finally committed to them, they may be allowed by the Court to separate, if they first agree upon and seal up their verdict, and afterwards affirm it in open Court; and that, if their verdict, when opened, does not cover all the issues on which they are to pass, the case may be recommitted to them and a verdict subsequently rendered will be good. (*Winslow v. Draper*, 8 *Pick.*, 170; *Pritchard v. Hennessey*, 1 *Gray*, 294; *Chapman v. Coffin*, 14 *Gray*, 454.) But if, upon returning into Court, one of the jurors dissents from the verdict to which all had agreed out of Court, it cannot be recorded. (*Lawrence v. Stearns*, 11 *Pick.*, 501.) In capital cases, indeed, the uniform practice in this Commonwealth has been to keep the jury together from the time the case is opened to them until their final discharge. But the practice is equally well settled, and in accordance with the decisions elsewhere, that, pending a trial for a misdemeanor, the jury may be permitted by the Court, without the consent or knowledge of the defendant, to separate and go to their homes at night, without vitiating the verdict. (*The King v. Woolf*, 1 *Chit.*, 401; *S. C.*, *nom. The King v. Kinnear*, 2 *B. & Ald.*, 462; *McCreary v. Commonwealth*, 29 *Penn. St.*, 323.) If the jury, in a case of misdemeanor, are allowed, without the consent of the defendant, to separate after the case is finally committed to them by the Court, and before the verdict is returned, the verdict cannot be recorded, unless it clearly appears that the verdict was not influenced by anything that took place during the separation. It was accordingly held, that, where the jury were allowed by the judge to disperse upon stating to the officer they had agreed on and sealed up a verdict, and, upon coming into Court, rendered an oral verdict, without any sealed verdict being produced or

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The United States v. Bennett.

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opened, or its contents made known to the defendant or his counsel, the verdict was invalid. (*Commonwealth v. Durfee*, 100 *Mass.*, 146; *Commonwealth v. Dorus*, 108 *Mass.*, 488.) But, when all possibility of improper influences is excluded by conclusive evidence that the jury arrived at and reduced to writing, before their separation, the same result which they afterwards announced in open Court, the verdict may be received and recorded. (*State v. Engle*, 13 *Ohio*, 490; *State v. Weber*, 22 *Miss.*, 321; *Reims v. People*, 30 *Ill.*, 256.)" These views seem to us to be the clear result of the authorities, and to be founded in reason. In the present case, it clearly appears that the jury, before they separated, arrived at the same result which they afterwards orally announced in due form, when enquired of by the clerk, in open Court, and, therefore, that the verdict was not influenced by anything that took place during the separation.

We have examined the cases cited by the counsel for the defendant, and find in them nothing inconsistent with the foregoing views.

After a careful consideration of all the points presented, we are unanimously of opinion, that the motion for a new trial, and to set aside the verdict, and for an arrest of judgment upon the same, must be denied.

*William P. Fiero*, (*Assistant District Attorney*,) for the United States.

*Abram Wakeman*, for the defendant.

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Filley v. Child.

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## GILES F. FILLEY vs. PERLEY A. CHILD. IN EQUITY.

G., having a patent for an improvement in stoves, acquiesced, during the entire duration of the patent, in the manufacture and sale by M., of stoves containing said improvement, with the name "charter oak" upon them. After the patent expired, M. continued to make and sell stoves containing said improvement, and to put the name "charter oak" upon them, but did not represent them as made by G. G., claiming the name "charter oak" as a trade-mark, applied to stoves containing said improvement, brought a suit to restrain the use of it by M., on such stoves: *Held*, that M. ought not to be so restrained.

(Before BLATCHFORD, J., Southern District of New York, June 4th, 1879.)

BLATCHFORD, J. The bill alleges, that the plaintiff, in 1851, "conceived of applying" the name of "charter oak," as a trade-mark, to cooking stoves embodying certain improvements in their internal construction, which he had invented, for the purpose (1) of securing to himself more completely and exclusively the benefits to be derived from the manufacture and sale of such cooking stoves, and (2) of giving to the same a particular name, to enable the general public and purchasers to distinguish the same from all other cooking stoves. It is not alleged in the bill that the plaintiff has ever applied the name "charter oak" to any other cooking stove than the one embodying said improvements, nor that the cooking stoves sold by the defendant, bearing upon them the name "charter oak," embodied said improvements, nor that the said improvements were patented to the plaintiff. It is shown that said improvements were patented to the plaintiff June 14th, 1853; that the patent was reissued to him December 27th, 1859; and that it was extended for seven years from the 14th of June, 1867. There is no evidence that any one, prior to the plaintiff, applied the name "charter oak" to a stove containing said improvements; and it is shown that all the stoves sold by the defendant have been stoves containing said improvements, and having upon them the name

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Filley v. Child.

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“charter oak.” The suit is not brought upon the patent, for a violation thereof. The bill alleges, that the use of said trademark by the defendant “is intended and designed and well calculated to deceive the public into the belief that the stove bearing it is the genuine stove” of the plaintiff, “since by said name ‘charter oak’ alone is the said stove bought, sold and known.” There is no evidence that any person buying one of such stoves as the defendant has so sold, would believe that he was buying a stove made by the plaintiff, although he would believe that he was buying a stove containing the improvements so patented to the plaintiff. As the patent has expired, and the defendant has a right to sell cooking stoves embodying the patented improvements, the sole question is, whether the defendant has a right to sell them with the name “charter oak” upon them. The evidence satisfactorily shows, that the plaintiff, during the entire twenty-one years’ duration of the patent, knew of, and acquiesced in, the manufacture and sale, by M. L. Filley and those under whom he claims, of cooking stoves containing the patented improvements, with the name “charter oak” upon them. M. L. Filley made the stoves now complained of. He has built up a business through such acquiescence, in the manufacture and sale of such cooking stoves, with such name. Under such circumstances, the plaintiff cannot, after his patent has expired, and when M. L. Filley has the right to make stoves containing said improvements, prevent him from calling them by the name of “charter oak,” so long as he does not represent them as being made by the plaintiff, or induce others to believe that they are made by the plaintiff.

The bill is dismissed, with costs.

*Samuel S. Boyd*, for the plaintiff.

*Esek Cowen*, for the defendant.

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Ingersoll v. Jewett.

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LORIN INGERSOLL, TRUSTEE, &amp;C.

vs.

JOHN C. JEWETT AND OTHERS. IN EQUITY.

L. sued J., in equity, for infringing a patent. J. set up, by plea, that, in June, 1875, L. sued T. for infringing the same patent; that T. was a licensee under a patent granted to W. before the patent to L. was granted, which embodied the improvement described in the patent to L.; that W. assumed the defence of that suit; that it was therein adjudged that W. was the first inventor, and that the patent to L. was void for want of novelty; and that J. was a licensee of W., under a license granted in October, 1874, and was making the article described in the patent to W.: *Held*, that the fact that the license was granted before the judgment was rendered was alone sufficient to prevent the judgment from operating as an estoppel against the plaintiff.

(Before WALLACE, J., Northern District of New York, June 5th, 1879.)

WALLACE, J. The proofs taken under the bill, plea and replication present the question of the effect of a former adjudication against the validity of the complainant's patent. The plea sets up this former adjudication as an estoppel in favor of the present defendants. The bill charges infringement, by the defendants, of letters patent granted to Eugene A. Heath, bearing date October 10th, 1871, for an improvement in metallic cuspadors. The plea alleges, that, in June, 1875, the complainant filed a bill, in the United States Circuit Court for the District of New Jersey, against Mary Turner and William Turner, for an infringement of the same patent; that the Turners were licensees, under letters patent granted to William H. Topham, bearing date August 2d, 1870, and reissued July 29th, 1873, which embodied the invention described in the complainant's patent; that Topham assumed the defence of the suit; and that it was therein adjudged by the Court, that Topham was the original and first inventor,

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Ingersoll v. Jewett.

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and that the complainant's patent was void for want of novelty. The plea further alleges, that the present defendants are licensees of Topham, and are manufacturing the article described in Topham's patent.

The proofs show, that the present defendants became licensees of Topham in October, 1874; and this fact is decisive against the defendants' position, that the decree in the former suit precludes the complainant from maintaining the present action, and renders it unnecessary to look into the proofs, to ascertain whether, as matter of fact, Topham was a party or privy to the former suit.

Assuming that Topham was a party to the former suit, in the sense that every person is a party who has a direct interest in the subject-matter of the suit, and who is permitted, although not named in the record, to control its prosecution or defence, the present defendants cannot avail themselves of a decree in his favor. The defendants, as licensees of Topham, have an interest carved out of Topham's grant, analogous to that of a lessee of real estate, and are privies in estate with Topham; and if, prior to the time they acquired their license, it had been adjudged, in a suit between Topham and the complainant, that Topham's grant, under his letters patent, was valid, and that of the complainant was invalid, that adjudication would have been conclusive, as an estoppel.

It is essential to the operation of an estoppel, that it be mutual, and, in considering the effect of a former judgment, which is invoked as an estoppel, if it be found that it would not be conclusive upon the rights of the parties, had it been adverse to the party invoking it, instead of in his favor, this consideration will be decisive against its efficacy. Therefore, in this case, if it is clear, that, had the former judgment sustained the complainant's patent and defeated Topham's, yet, nevertheless, the present defendants would not be concluded by that adjudication, it must follow, that the complainant is not concluded, as against these defendants, by that judgment.

Estoppels are sometimes said to be odious, and no one would dispute the truth of the aphorism, if a defendant, who had acquired a vested right in real or personal property, could be deprived of his right by the result of a suit brought subsequently, to which he was not a party, and in which he could not be heard. Judgments are binding upon privies as well as upon parties; but this rule is to be understood with the qualification, that only those are privies, within the meaning of the rule, who acquire their interest in the subject-matter of the suit subsequent to the suit. It is stated, in *Freeman on Judgments*, § 162, to be well understood, "that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit. A tenant in possession prior to the commencement of an action of ejectment cannot, therefore, be lawfully dispossessed by the judgment, unless made a party to the suit. The assignee of a note is not affected by any litigation in reference to it, beginning after the assignment. No grantee can be bound by any judgment in an action commenced against his grantor subsequent to the grant; otherwise, a man having no interest in property could defeat the estate of the true owner." As tersely put by Judge Selden, in *Campbell v. Hall*, (16 N. Y., 575, 579,) the rule relative to estoppel "can have no application, except where the conveyance is made after the event out of which the estoppel arises." (See, also, *Doe v. The Earl of Derby*, 1 Adolp. & Ellis, 783, and *Winslow v. Grindal*, 2 Greenl., 64.)

If the former suit had been decided against Topham, the defence of the invalidity of the complainant's patent would still be open to the defendants, and the complainant would not be permitted to say to the defendants—I have deprived you of your rights as licensees, by a litigation with your grantor, to which you were not a party, commenced after your license was granted; and, because of this, the defendants cannot now insist that their rights as against the complainant are conclusively established by a judgment which could not

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The Steam Stone Cutter Company v. Shortsleeves.

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enure to the advantage of the complainant, if it had been in his favor instead of being adverse.

Judgment is ordered for the complainant.

*Frederic H. Betts*, for the plaintiff.

*Charles F. Blake*, for the defendants.

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THE STEAM STONE CUTTER COMPANY

vs.

DAVID SHORTSLEEVES. IN EQUITY.

W., the patentee of inventions in steam stone cutting machines, granted to a corporation "the right to use said patented machine, or any number of said machines," in its quarry at S. C. succeeded to the rights of W., and another corporation to the rights of the corporation grantee in the quarry. D. was making a machine embodying the patented inventions, for the new corporation, for use in said quarry, and C. sought to enjoin D. from making such machine: *Held*, that the grant conveyed the right to make machines for said use, including the right to procure them to be made, and covered the making of them by the person procured to make them.

(Before WHEELER, J., Vermont, June 7th, 1879.)

WHEELER, J. This cause has been heard on the motion of the plaintiff for a preliminary injunction. The material facts appearing from the bill, answer and affidavits, on which the case is now presented, are, that George J. Wardwell, the patentee of inventions in steam stone cutting machines, granted to the Sutherland Falls Marble Co., a corporation, "the right to use said patented machine, or any number of said machines," "in their quarry at Sutherland Falls." The plaintiff has since succeeded to the rights of Wardwell, and another corporation, by the same name, to the rights of the Sutherland Falls Marble Co., in the quarry, and, for the pur-

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The Steam Stone Cutter Company v. Shortsleeves.

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poses of this motion now, in the patents, although a doubt is suggested about how that may ultimately appear. The defendant is a machinist, and is making a machine embodying the patented inventions, for the new corporation, at his shop, for their use in that quarry. This making is what is sought to be restrained.

It is a maxim of the common law, that any one granting a thing impliedly grants that also without which the thing expressly granted cannot be had; or, as expressed more pertinently to the precise question here, by Twysden, J., in *Pomfret v. Ricroft*, (1 *Saund.*, 321,) "when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use." (*Liford's Case*, 11 *Rep.*, 52, a.; *Lord Darcy v. Askwith*, *Hob.*, 234; *Howton v. Frearson*, 8 *T. R.*, 50; *Nichols v. Luce*, 24 *Pick.*, 102; *Coolidge v. Hagar*, 43 *Vt.*, 9; 2 *Wash. R. P.*, 622; *Broom's Max.*, 362; *Branch's Max.*, 32.) The foundation of it is the presumed intention of the grantor to make the grant effectual. (*Howton v. Frearson*, 8 *T. R.*, 50; *Nichols v. Luce*, 24 *Pick.*, 102; *Tracy v. Atherton*, 35 *Vt.*, 52.) And it is as applicable to grants of rights under patents, whether assignments or mere licenses, as to any other subject, where the true intent is sought for. (*Curtis on Pat.*, § 214.) This grant by Wardwell would not pass anything at all, unless the grantee could, in some way, procure the machines. It is suggested, in argument, that the intention was that they should be procured of the patentee, or from a manufacturer under him. But no grant of any right to use such machine would be necessary. The sale of it would carry the right. And, as said by Lord Kenyon, in *Howton v. Frearson*, when he made the grant, it must be taken that he intended to confer some beneficial interest; and, if it carried no right but to use machines procured from or under the patentee, none would be conferred.

As this grant is now viewed, the right to make machines for the use expressly granted passed, and this would include the right to procure them to be made, and cover the making

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Reissner v. Sharp.

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them by the one procured to make them. This is in accordance with the decision in *Steam Cutter Co. v. Sheldon*, (10 *Blatchf. C. C. R.*, 1.) The grant there was of the right to use the invention to the extent of one machine, and, under certain circumstances, to the extent of others, at the quarries specified. It is argued, that there is a material difference between the two expressions; but no such difference is apparent. The patented inventions are the subjects of the grants, and they would pass to the same extent, whether included in machines embodying them, without being otherwise mentioned, or mentioned to the extent of the machines, without otherwise mentioning the machines.

The motion is denied.

*Aldace F. Walker*, for the plaintiff.

*Wheelock G. Veazey*, for the defendant.

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CHRISTOPHER REISSNER AND OTHERS

vs.

JAMES L. SHARP. IN EQUITY.

Under § 4,857 of the Revised Statutes, which provides, that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term," a patent granted by the United States, October 20th, 1874, for 17 years from that day, was held to have expired on the 15th of May, 1878, because a patent was granted in Canada, under the authority of the patentee, for the same invention, on the 15th of May, 1878, for 5 years from that day, although, in March, 1878, the Canada patent was extended for 5 years from the 15th of May, 1878, and, also, for 5 years from the 15th of May, 1883.

(Before BLATCHFORD, J., Southern District of New York, June 7th, 1879.)

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Reissner v. Sharp.

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BLATCHFORD, J. Letters patent of the United States were granted to John A. Frey, October 20th, 1874, for an "improvement in coal oil stoves," for 17 years from that day. They were reissued to C. Reissner & Co., assignees, June 19th, 1877. The plaintiffs, composing the firm of C. Reissner & Co., and owners of the reissue, bring this suit against the defendant, for an alleged infringement of the reissue, and have moved for a preliminary injunction. Several defences are set up, but, as one of them is regarded as fatal to the motion, the others are not considered.

The original patent was granted while § 4,857 of the Revised Statutes was in force. That section is still in force. It provides as follows: "No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented, or caused to be patented, in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years." On the 15th of May, 1873, a patent, No. 2,366, was granted by the Dominion of Canada to one James Henry Thorp. This patent says: "No. 2,366. Canada. Patent of Invention. Whereas James Henry Thorp, of the city of Ottawa, in the county of Carleton, in the Province of Ontario, gentleman, has, in pursuance of 'The Patent Act of 1872,' by his petition to the Commissioner of Patents, stated that one John Augustus Frey, of Jersey City, in the county of Hudson, in the State of New Jersey, one of the United States of America, mechanic, has invented new and useful improvements in coal oil stoves, the title or name whereof is 'The Summer Queen Coal-oil Stove,' and, in effect, that, by instrument dated on or about the tenth day of April, in the year of our Lord one thousand eight hundred

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Reissner v. Sharp.

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and seventy-three, the said John Augustus Frey has assigned to the petitioner, James Henry Thorp, the right of obtaining the patent and the exclusive property in the said invention, and that such the invention of the said John Augustus Frey was not known or used by others before the said John Augustus Frey's invention thereof, and not being, at the time of the present application, in public use or on sale for more than one year previous to his said application, in Canada, with his consent or allowance, and that the said James Henry Thorp has elected his domicile at the city of Ottawa, in the Province of Ontario, in Canada, and whereas the said James Henry Thorp has also complied with the other requirements of the said Act: The present patent grants to the said James Henry Thorp, his executors, administrators and assigns, for the period of five years from the date of these presents, the exclusive right, privilege and liberty of making, constructing and using, and vending to others to be used, the said invention of John Augustus Frey, and which is called or known by the title or name of 'The Summer Queen Improved Coal-oil Stove,' and whereof a short description is as follows: It consists, 1st, in the water-tight casings, G, G, and tubular connections, H, H, secured to the wick-tubes and bottom of water-chamber, and enclosing the ratchet-wheels, C, C, and shafts, D, D; 2d, in the struts, I, applied, as set forth, for supporting the chimney ring, J, from the wall of the water-chamber; and, 3d, in hinging the chimney, N, to a strut, L, or its equivalent, for the purpose set forth. But, for fuller detail of the invention, reference must be had to the specification and drawing, one duplicate whereof is hereunto annexed and forms an essential part of this patent. Provided, that the grant hereby made is subject to adjudication before any Court of competent jurisdiction. And further, that this patent is subject to the condition, that the same and all the rights and privileges hereby granted shall cease and determine, and the patent shall be null and void, at the end of two years from the date hereof, unless the patentee, his executors or administrators, or his assignee or assignees, shall, within that period, have com-

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Reissner v. Sharp.

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menced, and shall, after such commencement, continuously carry on, in Canada, the construction or manufacture of the invention hereby patented, in such manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada. And, further, that this patent shall be void, if, after the expiration of twelve months from the granting hereof, the patentee, his executors or administrators, or his assignee or assignees, for the whole or a part of his interest in the patent, imports or causes to be imported into Canada, the invention for which this patent is granted. In testimony whereof, the Honorable John Henry Pope, Commissioner of Patents, has hereunto signed his name, and the seal of the Patent Office has been hereto affixed, at the city of Ottawa, in the Dominion of Canada, this fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-three. J. H. Pope. Counter-signed, J. C. Taché, Deputy Commissioner." The specification annexed to the said Canadian patent says: "Be it known that I, John Augustus Frey, of Jersey City, in the county of Hudson, and State of New Jersey, one of the United States of America, mechanic, have invented certain new and useful improvements on coal-oil stoves, and I do hereby declare that the following is a full, clear and exact description of the same: The first part of my invention relates to a means whereby the wick-tubes, above the oil-chamber of a coal-oil stove, can be surrounded with water, thus dispensing with the use of water-wicks for keeping the wick-tubes cool, and it consists in the application to the wick-tubes and base of water-chamber, of an angularly arranged casing to enclose the ratchet-wheels of the wick-tubes, and employment of a tubular connection of the said casing with the outer wall of the water-chamber, for enclosing the shafts of the ratchet-wheels, to prevent water passing through the apertures for such wheels in the wick-tubes to the oil-chamber. The second part of my invention relates to the manner of supporting the base rim or ring on which the chimney rests, by struts from the wall

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Reissner v. Sharp.

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of the water-chamber, whereby the weight of the chimney and cooking utensil placed thereon is removed from the bottom of the water-chamber and thrown against the wall, thus rendering the construction of that part of the stove more durable. The third part of my invention relates to hinging the chimney to its base ring, or to a strut secured to the wall or bottom of the water-chamber, whereby the chimney flues are kept in a proper position over the wick-tubes, without requiring special adjustment, after lighting the wick. Fig. 1 is a transverse, vertical section of a coal-oil stove embodying my invention, on the line *a, a*, of Fig. 2. Fig. 2 is a transverse, vertical section on the line *b, b*, of Fig. 1. A is the oil-chamber; B the wick-tubes; C, C, the ratchet-wheels; and D, D, the shafts for operating the wheels C; all constructed and arranged in the ordinary manner. F is the water-chamber, the wall of which rises to a suitable height above the oil-chamber, and not exceeding the base rim, J, of the chimney. G, G, are water-tight casings, secured in the angle formed by the wick-tubes and bottom of water-chamber, enclosing the ratchet-wheels C, C, to exclude water placed in the chamber F for cooling the wick-tubes, from entering the oil-chamber by the apertures in the wick-tubes in which the ratchets operate. The casings G, G, extend the whole breadth of the wick-tubes, and their ends are closed water-tight, thus forming a water-tight compartment or chamber enclosing the ratchet-wheels. To one end of the casing G is secured a water-tight connection H, passing through the wall of the water-chamber, and enclosing the shafts D, D, of the ratchet, so that the shafts can be operated in the usual manner for raising and lowering the wicks, without the possibility of admitting water within the casings. I are struts of any required number or form, secured to the wall of the water-chamber, placed inclinedly inward and fastened to the rim or ring J, on which the chimney N rests, to support said rim or ring fixedly over the wick-tubes. The weight of the chimney and of any utensil placed thereon is thus thrown outwardly against the wall of the water-chamber, and the

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Reissner v. Sharp.

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presence of such weight removed from the bottom of the water-chamber, thereby rendering that part of the stove more durable. K is a hinge connecting the chimney to a strut L, secured to the wall of the water-chamber, and which strut may be further secured by a brace M, bearing on the bottom of the water-chamber, or other convenient arrangement, or the chimney may be hinged to the rim or ring J, as before described. By hinging the chimney to a stationary or fixed support, the flues are kept in position to close over the wicks without special adjustment, when shutting down the chimney after lighting the wicks. Fig. 2 shows the chimney as partly raised for lighting wicks. I claim, as my invention, 1. The water-tight casings, G, G, and tubular connections H, H, secured to the wick-tubes and bottom of water-chamber, and enclosing the ratchet-wheels C, C, and shafts D, D, as and for the purpose set forth. 2. The struts I, applied as set forth, for supporting the chimney ring J from the wall of the water-chamber, as described. 3. In bringing the chimney N to a strut L, or its equivalent, for the purpose set forth. John A. Frey. Jersey City, April 17th, 1873. Signed in the presence of Elisha Cole, David Wood. This is the specification referred to in the affidavit of John Augustus Frey, hereunto annexed. Sworn before me this twenty-fourth day of April, 1873, at Her Britannic Majesty's Consulate General, New York. E. M. Archibald, Consul General, New York." No affidavit of Frey is annexed to the copy furnished to me, other than the above. A drawing with two figures is annexed to the specification. On the margin of the Canada patent are the following two entries: "Extended for a second period of five years under No. 8,496, from the fifteenth day of May, one thousand eight hundred and seventy-eight. J. C. Taché, Deputy Commissioner." "Extended for a third period of five years under No. 8,497, from the fifteenth day of May, one thousand eight hundred and eighty-three. J. C. Taché, Deputy Commissioner." It appears, otherwise that these two extensions were severally made on the 6th and 7th of March, 1878.

The specification of the original patent to Frey, No.

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Reissner v. Sharp.

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156,149, granted October 20th, 1874, on an application filed July 8th, 1874, set forth as follows, the specification being signed by Frey: "Figure 1 is a perspective view of my stove as arranged for use; Fig. 2 is a like view of the same, with the upper hinged portion turned to one side, so as to uncover the wick-tubes; and Fig. 3 is a vertical central section upon a line having a right angle to said tubes. Letters of like name and kind refer to like parts in each of the figures. My invention is an improvement upon a similar device which has before been manufactured and sold by me, and which is protected by several patents; and it consists in the peculiar construction of the funnel or chimney, and its combination with the wick-tubes, substantially as and for the purpose hereinafter shown. In the annexed drawing, A represents the reservoir for containing oil, which reservoir has, preferably, downward and outward flaring sides, and at its upper side and outer edge is enclosed by means of an annular flange, B, that has the height of about one and one-half inch, and is used to contain water for receiving the heat radiated downward from the burners, so as to prevent the same from being communicated to the oil. From the reservoir A two tubes, C and C, extend upward to the required distance, and serve to contain wicks, D and D, of usual shape. Said wicks are moved vertically by means of star-wheels, E and E, which latter are secured upon, and rotate with, suitable shafts, *e* and *e*. In order that the wick-wheel shafts *e* and *e* may be prevented from becoming warped by the action of the heat, so as thereby to change the relative positions of the wicks and engaging wheel, said parts are located within a suitable housing, *c*, below the water-line, by which means a perfect protection is afforded, and all liability to derangement avoided. Above and around the upper ends of the wick-tubes C and C is placed a cap, F, that is provided with cone-shaped kerbs, *f* and *f*, one of which coincides with each of said tubes, and permits the flame of the burning oil to pass upward from the wick. From the cap F, which is, preferably, constructed from cast metal, a sheet-metal cylinder, G, extends upward about seven inches,

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Reissner v. Sharp.

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and at its upper end is enclosed by a metal head, H, which latter is provided with two openings,  $h$  and  $h$ , that coincide in position with the wick-tube kerbs  $f$  and  $f$ , but have considerably larger horizontal dimensions. From each side of each opening  $h$ , a flange,  $h'$ , extends downward, and causes the heated escaping gases to be deflected toward the ends of said openings, instead, as would otherwise be the case, of passing outward, principally at the longitudinal centre of the same. The cylinder G, cap F, and head H, which form the chimney of the lamp, are hinged so as to permit of being turned to one side, as shown in Fig. 2. An elevated support, I, for cooking utensils, is secured to the upper end of said cylinder, and a number of glazed openings, K and K, are provided in the sides of the latter, completing the apparatus, the operation of which will be readily understood from the foregoing description. Having thus fully set forth the nature and merits of my invention, what I claim as new is: The combined cap and chimney, consisting of the cap F, provided with the kerbs  $f$  and  $f$ , the sheet-metal cylinder G, and the head H, provided with the openings  $h$  and  $h$ , and flanges or flue-plates,  $h'$  and  $h'$ , depending from the sides only of said openings, said parts being constructed and combined to operate in the manner and for the purpose substantially as shown."

The specification of the reissue of June 19th, 1877, on which this suit is brought, and the application for which was filed May 24th, 1877, is signed by Frey and sets forth as follows: "Be it known that I, John A. Frey, of New York, New York county and State of New York, did invent certain new and useful improvements in coal-oil stoves, for which letters patent No. 156,149 were issued to me upon the 20th day of October, 1874, which letters patent having been found defective, in that the specification and claims do not cover and embrace all of the original invention, as set forth in the application filed in the Patent Office on the 8th day of July, 1874: Now, therefore, being desirous of reissuing said letters patent, herewith surrendered, I have prepared and do hereby

declare that the following is a full, clear and exact description of the said invention, reference being had to the accompanying drawings, making a part of this invention, in which Figure 1 is a perspective view of my stove as arranged for use; Fig. 2 is a like view of the same, with the upper hinged portion turned to one side, so as to uncover the wick-tubes; and Fig. 3 is a vertical central section upon a line having a right angle to said tubes. Letters of like name and kind refer to each part in each of the figures. My invention is an improvement upon a similar device which has before been manufactured and sold by me, and which is protected by several patents; and it consists, principally, in a coal-oil stove having its wick-wheels, wick-wheel shafts, and the entire upper surface of its oil-reservoir covered by a water-reservoir, substantially as and for the purpose hereinafter specified. It consists, further, in a coal-oil stove in which the entire upper surface of its oil-reservoir is protected by a water-reservoir, and its wick-wheels and their shafts are enclosed by means of housings that are within said water-reservoir, and below its upper edge, substantially as and for the purpose hereinafter shown. It consists, finally, in the peculiar construction of the funnel or chimney and its combination with the wick-tubes, substantially as and for the purpose hereinafter set forth. In the annexed drawings, A represents a reservoir for containing oil, which reservoir has, preferably, downward and outward flaring sides, and at its upper side and outer edge is enclosed by means of an annular flange, B, that has a height of about one and one-half inch, and is used to contain water for receiving the heat radiated downward from the burners, so as to prevent the same from being communicated to the oil. From the reservoir A, two tubes, C and C, extend upward to the required distance, and serve to contain wicks, D and D, of usual shape. Said wicks are moved vertically by means of star-wheels, E and E, which latter are secured upon and rotate with suitable shafts, *e* and *e*. In order that the wick-wheel shafts *e* and *e* may be prevented from becoming warped by the action of the heat, so as thereby to change

the relative positions of the wick and engaging wheel, said wheels are located within a suitable housing, *c*, below the water-line, while said shafts are each contained within a tube, *c'*, that at its inner end communicates with said housing *c*, and at its outer end passes through the flange *B* that forms the outer wall of the water-reservoir, by which means a perfect protection is afforded and all liability to derangement is avoided. Above and around the upper ends of the wick-tubes *C* and *C* is placed a cap, *F*, that is provided with cone-shaped kerbs, *f* and *f*, one of which coincides with each of said tubes, and permits the flame of the burning oil to pass upward from the wick. From the cap, *F*, which is preferably constructed from cast metal, a sheet-metal cylinder, *G*, extends upward about seven inches, and at its upper end is enclosed by a metal head, *H*, which latter is provided with two openings, *h* and *h*, that coincide in position with the wick-tube kerbs *f* and *f*, but have considerably larger horizontal dimensions. From each side of each opening *h* a flange, *h'*, extends downward, and causes the heated escaping gases to be deflected toward the ends of said opening, instead, as would otherwise be the case, of passing outward, principally at the longitudinal centre of the same. The cylinder *G*, cap *F*, and head *H*, which form the chimney of the lamp, are hinged so as to permit of being turned to one side, as shown in Fig. 2. An elevated support, *I*, for cooking utensils, is secured to the upper end of said cylinder, and a number of glazed openings, *K* and *K*, are provided in the sides of the latter, completing the apparatus, the operation of which will be readily understood from the foregoing description. It will be seen, that, in consequence of the construction and arrangement of the water-reservoir and of the housings for the wick-wheels and their shafts, a perfect protection from heat is secured for said parts and for the oil-reservoir beneath. Having thus fully set forth the nature and merits of my invention, what I claim as new is: 1. A coal-oil stove having its wick-wheels, wick-wheel shafts, and the entire upper surface of its oil-reservoir, covered by a water-reservoir, substantially as and for the pur-

pose specified. 2. A coal-oil stove in which the entire upper surface of its oil-reservoir is protected by a water-reservoir, and its wick-wheels and their shafts are enclosed by means of housings that are within said water-reservoir and below its upper edge, substantially as and for the purpose shown. 3. The combined cap and chimney, consisting of the cap F, provided with kerbs *f* and *f*, the sheet metal cylinder G, and the head H, provided with the openings *h* and *h*, and flanges or flue-plates, *h'* and *h'*, depending from the sides only of said openings, said parts being constructed and combined to operate in the manner and for the purpose substantially as set forth."

It is very plain that Frey caused what was patented by the Canada patent to be patented by that patent. He assigned to Thorp the right of obtaining the Canada patent, and signed and swore to the specification for the purpose of the obtaining of that patent. The Canada patent was issued before the application for the original United States patent was filed.

The United States patent was granted for an invention which had been previously patented in Canada. So far as the plaintiffs are concerned, the invention claimed in the re-issue must be regarded as having been set forth in the original patent. The only question is, whether what is set forth and claimed in the re-issue, as the invention, is set forth as the invention in the Canada patent. Under § 19 of the Canada Patent Act of June 14th, 1872, a patent may be reissued "for the same invention." In the drawings and description of the Canada patent, there is described and shown, as the first part of the invention, what is described and shown and claimed, as part of the invention, in the description and claims and drawings of the United States reissue.

Under such circumstances, the statute requires that the United States patent "shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term," and that in no case shall the United States patent be in force

more than 17 years. By § 17 of the Canada Patent Act of June 14th, 1872, it is provided: "Patents of invention issued by the Patent Office shall be valid for a period of five, ten or fifteen years, at the option of the applicant; but, at or before the expiration of the said five or ten years, the holder thereof may obtain an extension of the patent for another period of five years, and, after those second five years, may again obtain a further extension for another period of five years, not, in any case, to exceed a total period of fifteen years in all; and the instrument delivered by the Patent Office for such extension of time shall be in the form which may be from time to time adopted, to be attached, with reference, to the patent, and under the signature of the Commissioner, or of any other member of the privy council, in case of absence of the Commissioner." It is provided by § 34 of the same Act, that "the following fees shall be payable to the Commissioner before an application for any of the purposes hereinafter mentioned shall be entertained, that is to say: On petition for a patent for 5 years, \$20; on petition for a patent for 10 years, \$40; on petition for patent for 15 years, \$60; on petition for extension from 5 to 10 years, \$20; on petition for extension from 10 to 15 years, \$20; on petition for extension from 5 to 15 years, \$40." It is contended for the defendant, that, although it be not necessary that the limitation should appear on the face of the United States patent, yet the United States patent must be limited so as to expire at the same time that the Canada patent would expire, according to the grant of it in force when the United States patent was granted, namely, at the end of five years from the 15th of May, 1873, and that the two extensions severally granted in March, 1878, cannot affect the question. The bill in this case was filed July 7th, 1877, and the defendant appeared August 3d, 1877. For the plaintiffs it is contended, that the United States patent must run until the Canada patent expires, under its extensions, namely, until May 15th, 1888.

In the case of *Henry v. The Providence Tool Company*,

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Reissner v. Sharp.

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in the Circuit Court for the District of Rhode Island, before Mr. Justice Clifford, in October, 1878, (14 *Off. Gaz. of Pat. Office*, 855,) a similar question arose in regard to a United States patent granted in October, 1871, under § 25 of the Act of July 8th, 1870, (16 *U. S. Stat. at Large*, 201,) which is embodied in § 4,887 of the Revised Statutes.. The United States patent ran, on its face, for 17 years. A patent for the same invention had been granted to the patentee, in Great Britain, in November, 1860, for 14 years, and it was contended that the United States patent expired, by operation of law, when the English patent expired. In reply, it was urged, that the language of the statute extended not only to the term of the foreign patent in force when the United States patent was granted, but also to the term of any prolongation which the patentee might obtain from the foreign Government. The patentee, before the English patent expired, applied for its prolongation, to Her Majesty, in council. Thirteen days after it expired, an order in council was made for the granting of a new patent for 4 years. Such prolongation operated as an extension of the original term, and the 4 years began to run at the moment when the original term expired. But Mr. Justice Clifford held, that Congress never intended to extend the term of the United States patent beyond the legal term secured to the foreign patentee when the United States patent was granted; and that no act of a foreign sovereign, nor any Act of a foreign legislature, could have the effect to prolong the term of a patent granted here, beyond the term prescribed by the Act of Congress. Mr. Justice Clifford refers, with force, to the considerations, that, as the statute refers not only to the foreign patent, but, if there be more than one, to the one having the shortest term, it cannot be held to include any subsequent prolongation or extension of the monopoly beyond that vested in the foreign patentee at the time of the granting of the United States patent; that, if Congress had intended otherwise, the language would have been different, and words would have been employed to signify that the domestic patent should continue as long as the

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Reissner v. Sharp.

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same invention was protected by the foreign Government; and that, under the opposite rule, neither the authorities of the United States, nor inventors, nor the public, would ever be able to know what the patentee acquired under a patent granted by the United States, in a case where the invention had been previously patented in a foreign country. Another view applicable to the present case is, that, before the Canada extensions were granted, the defendant had put in a plea to the bill, and the plaintiff had set down such plea for argument. There would, therefore, under the plaintiffs' view, be one rule governing this suit, if it were to be determined according to the state of things existing when it was brought, and there would be another rule governing suits brought on the United States patent after the Canada extensions were granted. The plaintiff suggests a distinction between the case of *Henry v. The Providence Tool Co.* and this case, because in this case the Canada patent did not expire before it was extended, and because an extension in Canada is not a matter of favor. But it is not perceived that these considerations are of sufficient force to cause any other conclusion as to the plain meaning of the statute to be adopted than that arrived at by Mr. Justice Clifford; and I think such conclusion is the proper one applicable to the present case.

It is contended for the plaintiff, that the second claim of the reissue of June, 1877, which is the only claim in question on this motion, is not patented in the Canada patent; and that no one of the three claims of the Canada patent contains the combination of elements which is embraced in the second claim of such reissue. But I think it quite clear that the statement in the Canada patent of the first part of the invention, and the substance of the first claim of that patent, embody the combination and arrangement found in the second claim of the United States reissue.

The motion is denied.

*Benjamin F. Lee*, for the plaintiffs.

*Arthur V. Briesen*, for the defendant.

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De Florez v. Raynolds.

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## RAFAEL DE FLOREZ AND ANOTHER

vs.

CHARLES T. RAYNOLDS AND OTHERS. IN EQUITY.

In a suit on a patent, after an interlocutory decree in favor of the plaintiff, the defendant applied to the Court for leave to file a bill to review the proceedings and the decree, and to amend the answer by setting up two French patents against the novelty of the plaintiff's patent, on the ground that, if the French patents had been in evidence, the decision would have been different. The application set forth, (1.) that the defendant was ignorant of the existence of the French patents until after the proofs were closed; (2.) that he did not know of their relevancy and materiality until after the decree was made and after he had employed new counsel; (3.) that the defendant's ignorance, and the insufficiency of a prior application, made after the proofs were taken and before the hearing, to admit said patents in evidence, was solely due to the inexperience and lack of legal knowledge of his former counsel; (4.) that, in selecting such counsel, the defendant was mistaken: *Held*, that the excuses offered were not sufficient to warrant the granting of the application, and that it was not clear that the result would have been different if the French patents had been in evidence.

(Before BLATCHFORD, J., Southern District of New York, June 9th, 1879.)

BLATCHFORD, J. The bill in this case was filed in May, 1875. It named as defendants Charles T. Raynolds, Thomas B. Hidden, Leonard Richardson and Edward L. Molineux, as members of and composing the firm of C. T. Raynolds & Co. In August, 1875, Aquila Rich was added as a defendant, as a member of said firm. In June, 1875, the four defendants originally made such put in an answer to the bill, which set forth that Rich was a member of the firm. The answer was sworn to by the defendant Richardson, and the name of George F. Martens was appended to it as attorney for the defendants, above the signature and oath of Richardson. The answer set up that Bouvet was not the original and first inventor of the patented invention, and other defences. A replication was

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De Florez v. Raynolds.

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filed to the answer. The taking of proofs for the plaintiffs began January 10th, 1876. The defendants took proofs on several days in March and April, 1876, Mr. Martens conducting the examination a part of the time, and Mr. Whitney a part of the time. The plaintiffs put in rebutting evidence on three days in April, 1876. The case was then ready for hearing. In October, 1876, a motion was made on the part of the defendants for leave to put in evidence on their part a French patent granted to Martin de Lignac, dated May 19th, 1847, No. 5,630, and the certificates of addition forming part thereof, and a French patent granted to one Dupas, dated December 2d, 1847. This motion was founded on two affidavits, one made by Mr. Whitney, the defendants' counsel, and the other by the defendant Richardson, both of them sworn to the 2d of October, 1876. The affidavit of Mr. Whitney set forth, "that he is an attorney and counsellor at law residing and doing business in the city of New York; that he has been attorney in fact for the defendants in the above entitled action, from the inception of said action, and that, since about the month of May last, he has been counsel for said defendants; that he has been fully familiar with the progress of the said action, and with the nature of the testimony produced therein by, or available to, the said defendants, in said action; that neither he, nor, to the best of his knowledge and belief, any other person connected with said action in behalf of defendants, was aware that the French patent granted to Martin de Lignac, May 19th, 1847, No. 5,630, and the certificates of addition forming part thereof, contained matter relevant or bearing upon the issues or subject matter of the above entitled action, but that, on the contrary, said defendant had no reason to suppose that said patent contained matter proper in evidence in said action, until after the testimony had all been taken, both for the complainants and the defendants in said action, but that, after the closing of such testimony, he became aware, that said French patent and the certificates of addition forming part thereof, did probably contain matter which should be produced in behalf of de-

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De Florez v. Raynolds.

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defendants in the above entitled action, from his connection with another and different matter, and with due diligence did proceed to obtain copies duly certified, of said French patent and the certificate of addition forming part thereof, in accordance with the usage of the French Government in such cases; and that he hath also with due diligence obtained a translation of said copy, which now, in connection with the certified copy hereinbefore named, he lays before this Court, praying that the above entitled action may be reopened for the admission of the aforesaid French patent and certificates of addition forming part thereof, as hereinbefore set forth, as evidence in behalf of the defendants in the above entitled action; and defendant also prays that said action may also be reopened for the admission in evidence of a certain French patent, granted to one Dupas, dated December 2d, 1847, which deponent is informed and believes describes "boxes with a band or a wire bound around top; ring at the overlapping end for opening the box; tearing off band by pulling," said patent last mentioned, as also the French patent to De Lignac, as deponent believes, being a direct anticipation of the United States patent granted to Jean Bouvet, on or about the 28th day of June, 1864, upon which the complaint in the above entitled action is based, but which said patent to Dupas deponent has not been able as yet to examine, or to obtain copies or translations of the same." The affidavit of Richardson set forth, "that he resides in the city of Brooklyn, and is a member of the firm of Charles T. Raynolds & Co., the defendants in the above entitled action, and that the said firm has confided to his charge all business affairs relating to the said action; that he had no knowledge of the French patent granted to Martin de Lignac, dated May 19th, 1847, No. 5,630, or the certificates of addition forming part thereof, contained matter relevant to the subject matter or issues of the above entitled action; and that he, the said deponent, was first made aware of the existence of such French patent, its certificates of addition, &c., and the contents thereof, by James A. Whitney, counsel for defendants in the above en-

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De Florez v. Raynolds.

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titled action, on the second day of October, 1876, and that, to the best of his knowledge and belief, no other member of said firm of C. T. Raynolds & Co. is aware of such patent or of the nature of the matter contained therein." This motion was argued by Mr. Jaques for the defendants, and was denied by this Court. This cause was heard on the pleadings and the proofs, by Judge Wheeler, who decided it in favor of the plaintiffs, (14 *Blatchf. C. C. R.*, 505,) and, on the 29th of June, 1878, an interlocutory decree was entered in favor of the plaintiffs, awarding a perpetual injunction and an account of profits.

On the 16th of October, 1878, the defendants gave notice of an application to this Court for leave to file a bill for the purpose of having the proceedings in this suit, and especially the decree therein, reviewed, reversed and set aside, and that all proceedings had therein and thereunder be vacated and set aside, and that no further proceedings be had therein or thereunder, and that the answer in this suit be amended by setting up the new matter set forth in a petition on which such application was founded, and that this suit be reheard. The said petition is sworn to by all the defendants except Rich. The petition sets forth that the said decree has been enrolled; that the injunction under it was served July 2d, 1878; that the accounting is being proceeded with; "that, since the time of pronouncing said decree, your petitioners have discovered new matter of consequence in the said cause," particularly the French patent of Dupas, dated December 2d, 1847, and the addition thereto dated March 14th, 1848, and the French patent to De Lignac, dated May 19th, 1847, and the addition thereto dated December 6th, 1847, and the second addition thereto dated February 19th, 1848; and that, if the said two French patents had been read in evidence and considered by the Court, said decree would almost certainly not have been made, but it would have been decided either that the plaintiffs' patent was void for want of novelty, or that the defendants did not infringe it. The petition sets forth the reason for so stating, founded on a comparison of

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De Florez v. Raynolds.

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the contents of the Dupas and De Lignac patents with the plaintiffs' patent. It also states, that, when this suit was brought, the defendants referred the matter of defending the suit and doing all things requisite therefor, to the defendant Richardson, as the one among them the best qualified to take charge of such matter, he having the supervision of the cans made, used and sold by the defendants. It then proceeds: "And Leonard Richardson, one of your petitioners, says, and the other of your petitioners say, upon information and belief, that the said Richardson immediately consulted James A. Whitney, Esq., of New York city, formerly their attorney and counsel in the said suit, whom your petitioners were recommended to employ, to advise them and defend the suit, by one G. H. Churnock, the inventor and patentee of the can used by your petitioners, Mr. Whitney having solicited his said patent and others relating to cans, and thereby acquired an extensive knowledge of the state of the art, and as a competent person to advise your petitioners and to defend the suit. And your petitioners, being informed by Mr. Richardson that he had been acquainted for a little time previous with Mr. Whitney, and that he was a counsellor in patent causes, and made a specialty of such matters, and supposing that he was a counsellor of this Court, of extensive experience, your petitioners employed and directed Mr. Whitney to investigate the plaintiffs' claims, to advise them as to the validity thereof and the course to be pursued by your petitioners in the action, and to do whatever was requisite and proper for maintaining such defences as might be available to them. Your petitioners were not acquainted with the patent laws of the United States, and were not aware that a patent is not authorized to be issued for an invention which has been previously described in a foreign publication, or patented abroad, and relied, therefore, upon the professional knowledge of Mr. Whitney, the advice which he should give them and his acts in their behalf. After Mr. Whitney had, as they were informed and believed, investigated and considered the matters intrusted to him as aforesaid, they were advised by him that

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De Florez v. Raynolds.

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the plaintiffs' patent was void for an irregularity in the application for it, and also that the cans made by your petitioners were not an infringement of the plaintiffs' patent, both of which points the Court, by its said decree, decided against your petitioners. Your petitioners have been, since the decree, informed that no search was made among the records of foreign patents, for anticipations of the plaintiffs' said reissued patent. They did not themselves make such a search, because they were not, any of them, aware that such search would have been usual or proper, or that if, in the course of such search, an anticipating foreign patent had been found, it would have availed them as a defence, nor were they aware how or where such a search could have been prosecuted, nor were they advised on the subject, and they had given Mr. Whitney authority to do whatever might be requisite and proper in their behalf. And your petitioners are informed by W. A. Jenner, Esq., one of their present counsel, whose affidavit is hereto annexed, that Mr. Whitney did not make, or cause to be made, a search for such foreign anticipating patents, because it did not occur to him to make such a search, and that he was not aware that such search was usual or proper. Your petitioners further show, that, on or about the 1st day of October, 1876, or shortly prior thereto, as they have been informed by Mr. Whitney, he, while engaged in other business, became aware of the existence of the said Dupas and De Lignac patents, and communicated such knowledge to Leonard Richardson, one of your petitioners, without, however, explaining to him their importance and relevancy to the issues. Thereupon Mr. Whitney made a motion in the said suit, upon the affidavits of himself and the said Richardson, to the end that the said Dupas and De Lignac patents might be admitted in evidence in the said suit, but did not explain in the said motion papers the reasons why the said French patents had not been set up in the answer, or excuse the negligence in not before ascertaining the facts as to said patents. Thereupon, and on or about the seventh day of October, 1876, the said motion was argued before the Honorable Samuel Blatch-

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De Florez v. Raynolds.

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ford, by David R. Jacques, Esq., who was employed by Mr. Whitney, and the said motion was denied without any opinion having been rendered by the Court. Your petitioners further show, upon information and belief, that, upon the argument of the said cause before the Honorable Hoyt H. Wheeler, Mr. Whitney attempted, in the course of his argument, to refer to the said Dupas and DeLignac patents, as illustrations of the prior state of the art, but such reference was objected to by the counsel for the complainants, as irregular, on the ground that the same were not a part of the case, whereupon Mr. Whitney desisted from further reference thereto, and your petitioners, therefore, say, that the same were not considered by the Court, and no reference to them is made in the opinion. And your petitioners further show, upon information and belief, that, at the time they employed Mr. Whitney as counsel, and that he accepted their employment, Mr. Whitney was not a counsellor of this Court or admitted to practice in any Court of this State, or qualified to appear therein, or to advise them as to their defence, or to take any steps on their behalf, and that he did not become a counsellor of this Court, or of the New York Supreme Court, until on or about the 26th day of May, 1876; and that George F. Martens, Esq., who appeared as their solicitor, and, as such, signed their answer, was not employed by your petitioners, nor were they acquainted with him, nor did they counsel with him; and, therefore, your petitioners say, that, at the time they were advised as to their defence in the said suit, and the steps proper or necessary to be taken for the protection and maintenance of their interests and rights, and at the time their answer in the said suit was prepared and filed, they did not have the benefit of the advice of a counsellor of this Court. Your petitioners further say, that the plaintiffs' attorney and counsel have asserted and still assert, that, in the accounting herein they expect to recover from your petitioners at least \$50,000 as profits, and, if your petitioners should be compelled to pay such sum, they believe that they would be unable to recover back the same." The petition is accom-

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De Florez v. Raynolds.

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panied by an affidavit made by the defendant Richardson, which says: "At the time the suit in the annexed petition mentioned was commenced, I was directed by my co-defendants to employ counsel and take especial charge of our defence therein, as I was more familiar than the other defendants with our can manufacture, and the subject matter of the litigation. I had been acquainted for about years with Mr. Whitney, our former counsel in said suit, and, upon the suit being commenced, was recommended by Mr. G. H. Churnock, the patentee of the can used by us, to employ Mr. Whitney, because he was acquainted with the subject of tin cans as affected by patents, and would be a very competent person to take charge of our interests. Mr. Whitney had also obtained the patent for the can used by us, and, as I was informed, others relating to the same subject, and had thereby acquired an extensive knowledge of the art. I supposed, at that time, Mr. Whitney to be a counsellor at law, my impression being derived from the signs upon his office door, on which he advertised as a solicitor of patents, his possession of a library, and I supposed that he was a lawyer who made a specialty of matters relating to patents, and had acquired an extensive experience therein. I directed Mr. Whitney to investigate the claims of the plaintiffs and advise us upon the subject, and authorized him to do whatever was requisite and proper for maintaining any defences which we might have. After Mr. Whitney had examined the subject of the litigation, he advised me that the plaintiffs' patent was void for an irregularity in the application, and also that the cans made by the defendants did not infringe. When, about the 1st of October, 1876, Mr. Whitney informed me of his being referred by the Patent Office to the Dupas patent, and that he had a copy of the latter, he did not explain to me the importance of these patents or their scope, nor did I understand that they were anticipations of the plaintiffs' invention, or that it was important that the answer should be amended so as to set them up; and I did not become acquainted with the contents of said Dupas patent, nor understandingly of the De Lignac patent,

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De Florez v. Raynolds.

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until the same were brought out by search made by Messrs. Wetmore and Jenner, our present counsel, subsequent to the decree. I intrusted these matters entirely to Mr. Whitney. I supposed that whatever was proper to be done would be regularly done by him. My attention was not called to the fact that George F. Martens, Esq., was attorney of record for us, as I have not had any acquaintance with him, and did not employ him nor counsel with him." The affidavit of Mr. Jenner, referred to above, says: "That, on the 7th day of September, 1878, he saw James A. Whitney, Esq., formerly attorney and counsel for the above named petitioners in the suit of Rafael de Florez *et al.* against them, for the purpose of ascertaining from Mr. Whitney why the Dupas and De Lignac patents, referred to in the annexed petition, were not mentioned in the answer in the said suit. Mr. Whitney informed me that he discovered the said patents on or about the 1st day of October, 1876, by accident, being referred to them by the Commissioner of Patents, in an application for a patent which he was then making to the Patent Office; that he, Mr. Whitney, did not make any search for French patents or other anticipations of the Pinner patent set forth in the complainants' bill in said suits or of the device used by the defendants, for the reason that he had no acquaintance with the French language, or so slight an acquaintance that he could read the said language only by the aid of a dictionary; that the said suit of De Florez against Raynolds was his first case, and he was not acquainted with the practice of examining at the Astor Library for foreign anticipations, and it did not occur to him to make any search or procure one to be made. Deponent further says, that he requested Mr. Whitney to make an affidavit of the facts so stated by him, having told him that he was preparing a petition for a review of the decree in said suit, and desired to use it in that connection, but Mr. Whitney refused to make any affidavit." There is also an affidavit of Mr. Richardson, stating that the petitioners did not employ Mr. Jacques as their counsel, and had no communication with him respecting their defence in the action;

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De Florez v. Raynolda.

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and that Mr. Jacques was employed by Mr. Whitney to argue said motion, because of Mr. Whitney's intention to leave the city, and did not at any time advise the petitioners regarding the suit.

This application is made on the ground that the French patents to Dupas and De Lignac are an answer to the charge of infringement, and that the decision of the Court, on final hearing, would have been different, if the proofs had embraced those patents. In regard to the omission to introduce those patents into the proofs, it is contended, (1.) that the defendants were ignorant of the existence of those patents until after the proofs were closed; (2.) that they did not know of their relevancy and materiality until after the decree was made, and after they had employed their present counsel; (3.) that the ignorance of the defendants and the insufficiency of the application made in October, 1876, to admit said patents in evidence, were solely due to the inexperience and lack of legal knowledge of Mr. Whitney, so that the defendants were not advised as to the necessity of searching for those patents, nor as to their legal effect when found, and the rules of practice of the Court were not followed in the application made for their admission in evidence; (4.) that, in the selection of Mr. Whitney, the defendants were misled and mistaken, and were ignorant of the fact that he was not authorized and qualified to perform the duty which he undertook.

This is not a case of newly discovered evidence. The gravamen of the application is the alleged laches and inexperience and incompetency of Mr. Whitney. If such grounds were to be admitted as reasons for opening cases, there would never be an end of a suit, so long as new counsel could be employed who could allege and show that prior counsel had not been sufficiently diligent, or experienced or learned. Questions of the kind have often been presented. In *Ruggles v. Eddy*, (11 *Blatchf. C. C. R.*, 524,) application was made to amend an answer and contest the question of the infringement of a patent, which had been admitted, on the ground that, if the defendants' counsel had sufficiently studied the

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De Florez v. Raynolds.

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patent and examined the defendants' stoves, the admission of infringement would not have been made. The ground urged was, that the defendants' counsel had not been diligent enough. The Court (Judge Woodruff) said: "I am constrained to hold the defendants concluded. Their case, as made by themselves, rests either upon their own want of due diligence, or the want of due intelligence on the part of their counsel. By this the complainant ought not to be so far prejudiced as, after decree, reference and report of the master, to be compelled to go again through the litigation, on a point distinctly presented, and proper to be met at the outset. Their case, as presented by the counsel whom they have employed for the purposes of this motion, and who regards it as clear that, as to most of the stoves which they had made, they had avoided the operation of the patent, seems, at first view, one of hardship; but, if that is so, the defendants have brought it upon themselves, by their own negligence, or by relying on a degree of vigilance, study and accuracy on the part of their several counsel, which they now think was inadequate to their protection. No case has been referred to which, in any degree, tends to sanction the latitude of indulgence which the defendants here seek. Cases are numerous tending in the other direction, of which *India R. Co. v. Phelps*, (8 *Blatchf. C. C. R.*, 85,) *Hitchcock v. Tremaine*, (9 *Id.*, 550,) *Prevost v. Gratz*, (*Peters C. C. R.*, 364,) and *Livingston v. Hubbs*, (3 *Johns. Ch. R.*, 124,) are examples." The same principle is found in *Webster Loom Co. v. Higgins*, (13 *Blatchf. C. C. R.*, 349,) in this Court. The case of *Cutler v. Rice*, (14 *Pick.*, 494,) was one of a different kind, and the decision was put on the ground of surprise.

The foregoing remarks are based on the assumption that the matter now sought to be introduced would, if it had been in the case, have led to a decision in favor of the defendants. It is well settled, that, in the case of an application, on the ground of newly discovered evidence, to vacate the decree in an equity suit on a patent, and allow the answer to be amended and the case to be retried, the application can be granted

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De Florez v. Raynolds.

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only "for the gravest reasons and the plainest proof of the sufficiency of the newly offered evidence to lead the Court to a different result." (*Buerk v. Imhaeuser*, 10 *Off. Gaz. of Pat. Off.*, 907.) An examination of the text of the Dupas and De Lignac patents, in connection with the affidavit of Mr. Copeland, leaves it in great doubt whether the plaintiffs' invention is anticipated or whether the defendants' structure is described by Dupas or De Lignac. This is my conclusion, after considering Mr. Renwick's affidavit. The original patent to Dupas refers to a way of opening a box by means of an iron wire, with a looped end, soldered on the cover of the box, but no sufficient or detailed description is given. The addition to the Dupas patent refers to a mode of closing the entire end of a box by applying a thin plate soldered on such end, with a wire ring attached to one end of such plate; and, as Mr. Copeland says, there is also indefinitely described, what appears to be a narrow band of thin metal, with a wire terminating in a ring, the band of metal and the wire being both of them soldered their entire length to the exterior of the box. Mr. Copeland says: "In my opinion, neither the patent nor the addition describes any device with language sufficiently explicit to enable that particular thing to be constructed by a mechanic, with the exception, perhaps, of the plate furnished with a ring and closing the entire end of the box. It does not, in my opinion, describe the invention of the complainants herein." There is no evidence in the case which outweighs this opinion of Mr. Copeland's, and my judgment concurs with his.

As to the original patent to De Lignac, it describes the insertion of a band of lead or pewter, easily cut, between the box and its cover. The first addition is of no importance to this case. The second addition is stated, in the title, to consist "of a tin band added to the lead hoop." The text says: "As it has occurred that boxes having lead or pewter hoops have been damaged by shocks with the tin portions of the boxes, I have been obliged to protect the pewter or lead by a more resistant metal. I have accomplished this in slightly

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De Florez v. Raynolds.

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modifying my style of hooped boxes, sufficiently, however, to render this addition to the patent already taken deemed necessary. I have replaced the lead and pewter hoops by a tin band of nearly the same width as the latter. Then I have plentifully soldered this band with lead on the under side to the outside of the cover and of the body of the box. Here the lead solder replaces the original hoop of the first patent, in borrowing from the tin which covers it its resistance to shock. I have been careful to keep the tin band about two centimetres larger than the outer circumference of the box, so that the end of the band, which I terminate by a ring or loop, covers about two centimetres of the part first soldered. When the box is closed, on grasping the ring and pulling, the lead will be easily torn, as, in the former instances, it was easily cut." Mr. Copeland's view of this language is, that it says that the band of lead to be protected may be replaced by a thick coating of lead solder applied to the under side of the tin band, which is then soldered to the cover and the box, so that, on removing the tin band, the cover is still united to the box, as before, by the lead or other soft metal, which may be easily cut. Mr. Copeland says: "In my opinion, it neither describes nor suggests the invention of the complainants; and, in fact, in placing the lead or solder under the band, it does purposely what the complainants intended to avoid." To say the least, the description is ambiguous. It clearly describes a band of tin lined with lead to close a can. This is not the plaintiffs' structure, nor the defendants, as was held by Judge Wheeler.

The application is refused.

*W. K. Hall* and *J. J. Marrin*, for the plaintiffs.

*Edmund Wetmore*, for the defendants.

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*In re Martin Gallagher and Daniel Lane, Bankrupts.*

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IN THE MATTER OF MARTIN GALLAGHER AND DANIEL LANE,  
BANKRUPTS.

A bankrupt had a permit from the Comptroller of the city of New York to occupy a stand in a market, paying therefor a weekly rental. The license was revocable at the pleasure of the Comptroller, and could not be transferred without written permission. It was the custom of the city to allow such a permit to be assigned. It bore a value, as an article of sale. The bankrupt paid \$4,000 for his permit, to his assignor. He placed that value on it in a statement of his assets made by him, as a basis for credit, to a creditor who afterwards became his assignee in bankruptcy. The District Court, on the petition of the assignee in bankruptcy, ordered that the bankrupt execute a transfer to the assignee of the right to the permit, and a request to the Comptroller to consent to such transfer. On a petition of review, claiming that the permit was not property which passed to the assignee in bankruptcy: *Held*, that the bankrupt was estopped from asserting that the right enjoyed under the permit was not property in his hands; that the sale value of such right would, when realized by the assignee, under the transfer papers, be the proceeds of the property of the bankrupt; and that the order of the District Court was proper.

(Before BLATCHFORD, J., Southern District of New York, June 11th, 1879.)

On the 16th of April, 1879, Horace W. Day, assignee in bankruptcy of Martin Gallagher and Daniel Lane, composing the firm of Gallagher & Lane, presented to the District Court, in bankruptcy, a sworn petition, setting forth as follows: "That, for many years past, your petitioner and one Paolo Sgobel have transacted, in said city, a general commission business in imported fruits, particularly oranges and lemons, under the firm name of Sgobel & Day; that, during said years, it has been the custom of your petitioner's firm, as well as all other firms transacting similar business in said city, to sell the greater portion of their fruits through a certain firm of auctioneers; that it has also been the custom of said business for the several importers to require of all persons buying their goods on credit through said firm, to deposit with said auctioneers, at the beginning of each year, a

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*In re Martin Gallagher and Daniel Lane, Bankrupts.*

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statement showing their assets and liabilities, which statement was duly verified, and was the basis of such person's credit; that, during said years, the bankrupts were retail dealers in fruits, and had their place of business at a stand in Washington Market, New York, and were buyers of the fruits of your petitioner's firm, and other firms, through the aforesaid auctioneers; that, on or about the 10th of January, 1878, the said bankrupts, for the purpose of obtaining credit during that year on their purchases of fruit through said auctioneers, deposited, as aforesaid, a statement showing their assets and liabilities; that, according to said statement, the said bankrupts were the owners of the said stand in Washington Market, which was, in said statement, valued at the sum of \$4,000; that, by reason of said statement, and partially because of the alleged situation and value of said stand, the said bankrupts were permitted to buy on credit, as aforesaid, large quantities of fruit belonging to your petitioner's firm and said other firms; that, thereafter, and on the 4th of June, 1878, the said bankrupts then being indebted to said firms for said fruit, to an amount exceeding \$10,000, a petition in bankruptcy was filed in the said District Court against said bankrupts, who were thereafter, and on the 15th day of said month, duly adjudicated bankrupts, and thereafter your petitioner was duly appointed and duly qualified as assignee of their estate, and still remains such assignee; that, as such assignee, your petitioner has inquired into the title and interest of said bankrupts in and to the aforesaid stand in said market, and has ascertained from the authorities of the city and county of New York, that said city owns the fee of the land upon which said stand is erected, and, as such owner, claims title to the said stand; but deponent is further informed, that said bankrupts, at the aforesaid times, held and now hold a license or permit from said city to occupy and enjoy said stand and conduct their business therein; and that, because of certain long prevailing customs, said license is practically irrevocable, and the right to occupy thereunder may continue unquestioned for an indefinite number of years, subject to the

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*In re Martin Gallagher and Daniel Lane, Bankrupts.*

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payment of a small yearly rent to said city ; and that it is the custom and practice of said authorities to allow the holders of such licenses or permits to assign the same, and for said city to transfer such license to such assignee, and thereafter recognize such assignee as entitled to occupy said stand ; that said permits are held by the owners thereof at a large price or premium ; that said bankrupts have informed your petitioner that they paid to the assignor of their permit, and as consideration for the transfer thereof to them, the said bankrupts, about the sum of \$4,000, which was the basis of the value of said stand, as set forth in said statement of assets, and your petitioner verily believes that a purchaser could be found for said permit, who would pay nearly the above mentioned sum therefor, provided the same would be transferred to him by said city ; that your petitioner has exhibited the general assignment of said bankrupts' effects by the register in bankruptcy herein, to said authorities, but they refuse to recognize the same, and refuse, by virtue thereof, to transfer the said license or permit now held by said bankrupts to your petitioner, but your petitioner is informed and verily believes, that, if said bankrupts should personally, under their own hands, execute an assignment of said license to your petitioner, the said authorities would recognize the same, and would thereupon transfer said license to your petitioner, and thus enable your petitioner to obtain the value thereof for the benefit of the creditors therein ; that said bankrupts have, ever since the adjudication herein, continued to use and occupy said stand for their own benefit, and now are conducting their business therein ; and that said creditors have received no benefit therefrom." The petition prayed for an order directing the bankrupts to severally execute an assignment to the petitioner of their interest in the said license, so that the value thereof might be secured to their creditors. The bankrupts answered the petition. The answer sets forth as follows: " That, prior to the year 1863, and under and by virtue of certain ordinances of the Mayor, Alderman and Commonalty of the city of New York, passed under the authority of the Char-

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*In re Martin Gallagher and Daniel Lane, Bankrupts.*

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ter granted to said, The Mayor, &c., by an Act of the Legislature of the State of New York, passed April 14th, 1857, (*Laws of New York, 1857, chap. 446, p. 874,*) a department was created, called and known as, 'Of the City Inspector's Department,' which embraced a 'Bureau of Markets;' that the provisions of said ordinance, with respect to markets, are as follows: Section 45, Revision of 1859. This Bureau, the chief officer of which shall be called the Superintendent of Markets, is charged with the duty of superintending the public markets, the inspection, regulation and management thereof, and of the transferring stalls and stands, and all other stalls and stands therein, and shall receive an annual salary of two thousand dollars; that the said ordinances contain these further provisions respecting the occupation of stalls and stands in the public markets, to wit: Sec. 50. He may, with the consent of the City Inspector, grant permits, in writing, to such persons as may be proper, at a daily rate, to be mentioned therein, to occupy stands in the public markets, and may, at any time, with the like consent, annul such permits. Sec. 57. It shall be the duty of the Superintendent of Markets to prepare a register or list of all permanent stalls or stands of the several markets; the names of those occupying, and the fee or rent per week or month, paid for the same; and the Superintendent, under the direction of the City Inspector, for that purpose, shall have the power to arrange and renumber the stands or stalls in the several markets, and equalize the rents or fees thereof; and the occupants of such stands or stalls, shall immediately, at their own expense, cause numbers to be placed thereon. A copy of such register or list shall, immediately after the same has been prepared, be filed by said Superintendent with the Comptroller, and all returns of market rents or fees shall be made in accordance with such register or list. Sec. 58. No transfer or assignment of any stall or stand, in any of the public markets, shall be made without written permission of the City Inspector and the Superintendent of Markets, and such transfer duly entered upon such register or list, and notice thereof given to the

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*In re Martin Gallagher and Daniel Lane, Bankrupts.*

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Comptroller, who shall consent to such transfer before any removal can be made of such transfer. In case of any person being removed, or any permit being annulled, the party or parties in interest shall have the privilege of making an appeal to the Common Council on any decision made by the City Inspector concerning such removal. Sec. 65. They, (the clerks of markets,) may suspend any person having a stated stall or stand in a public market, to which they are respectively attached, or occupying a part thereof, or of the street adjoining the same, from occupying or using any part of such market or street, whether he be a licensed butcher or not. Sec. 66. Immediately upon such suspension, the clerk making the same shall report the facts thereof, with the reasons for the suspension, to the City Inspector, who shall hear the same, upon sufficient notice to the person suspended, and an opportunity afforded him to be heard in his defence, and whose decision upon the matter shall be final, provided the Mayor shall approve the same; that, by section 1 of the Act of Legislature of the State of New York, passed April 24th, 1863, and known as chapter 227 of the Laws of 1863, (*Laws of New York*, 1863, p. 407,) it was provided, among other things, as follows: 'The Bureau for the inspection, regulation and management of the public markets of the city of New York shall hereafter be in the finance department of said city, and all laws and ordinances now in force relative to the bureau of markets, or superintendent or other officers thereof, shall apply to the said Bureau as herein provided;' that, by the said City Charter, (sec. 22,) the Comptroller is made the chief officer of the finance department, and that, under and by virtue of the said statute, the word 'Comptroller' has been substituted for the word 'City Inspector,' wherever the same occurs; that, by a certain other Act of the Legislature of said State of New York, known as chapter 158 of the Laws of 1832, (*Laws of New York*, 1832, p. 251,) it was provided, in substance, that any and all ordinances of the Mayor, Aldermen and Commonalty of the city of New York might be read in evidence from a volume of said ordinances printed by author-

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*In re Martin Gallagher and Daniel Lane, Bankrupts.*

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ity of the Common Council of said city of New York; that, under said Charter, laws and ordinances, and not otherwise, and on or about the 27th of September, 1873, a permit or license was issued to your respondents, in the following words and figures, to wit: 'No. —. City and County of New York, Comptroller's Office, New York, September 27th, 1873. Permission is hereby granted to Martin Gallagher and Daniel Lane to occupy the stand Nos.  $\frac{1}{2}$  of 305, 306 and 307, 33, 35, 37, Country row, in Washington market, at the weekly rental of thirteen  $\frac{75}{100}$  dollars, or such other increased weekly rental as may be established from time to time, the said Gallagher and Lane stipulating and agreeing, in the use and occupancy of said stand, to be governed by and obey the ordinances, rules and regulations now established, or to be established hereafter, for the management of the public markets; the above stand to be occupied only as a stand for the sale of country produce. This permit is revocable at the pleasure of the Comptroller, and cannot be transferred without his written permission. And. H. Green, Comptroller. Thos F. Devoe, Superintendent of Markets;' that a permit or license given under the aforesaid provisions does not constitute property; that it confers upon its holder no right or interest cognizable by Courts, or capable of being protected by them; and that Courts cannot compel a permit to be given, nor prevent one from being annulled, nor in any manner review the actions of any of the officers mentioned in the ordinance, nor compel the recognition of one who should purchase or acquire a permit under its order or decree, nor put such a purchaser or party acquiring such license in possession, or protect him in his possession."

The case was heard on such petition and answer, by the District Court, and that Court, (CHOATE, J.) made the following decision: "This is a motion to compel the bankrupts to transfer to the assignee their license or permit to occupy certain stalls in Washington Market. The objection is taken, that it is not property which passes to the assignee under the bankrupt law. It appears, that the right to use and occupy a

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*In re Martin Gallagher and Daniel Lane, Bankrupts.*

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certain portion of the market is granted by the city for a certain fixed rent, without limit of time; that it is revocable at the will of the city; and that its assignment gives the assignee no rights, unless consented to by certain officers of the city. It appears, however, that such rights have a well established pecuniary value, and, by an established usage of the city in dealing with them, there is no practical difficulty in the transfer of them from one party to another; that, in a statement of their assets made to induce credit in their business, these bankrupts, within a year before their bankruptcy, put down these Washington Market stands as worth \$4,000; that they cost about that sum, and can be sold for nearly as much; and that the creditors of the bankrupts were, in fact, induced to give them credit, partly on the ownership of these rights. The assignee, having applied, under his general assignment in bankruptcy, to the city, has been refused any recognition as assignee of the license, and now shows, by affidavit, that, if he shall have an assignment directly from the bankrupts, his rights as assignee will, probably, be recognized. I think the objection, as applied to this case cannot avail. It is obvious enough, that this license or right, or whatever it may be called, has a fixed pecuniary value. It was a part of the bankrupts' capital in business, in which they had invested their money, and on the faith and credit of which they incurred their debts. It is grossly unjust and inequitable, under these circumstances, that they should be permitted, on merely technical grounds, to withhold it from their creditors. If, in one sense, and for some purposes, it cannot be regarded as 'property,' as, for instance, for the purpose of being held by a receiver, (*Barry v. Kennedy*, 11 *Abb. Pr. R., N. S.*, 421,) yet it seems to me that it is clearly property within the province of the bankrupt law. There is a distinction between this purely business right and the right of membership in a business exchange or company. Thus, it has been held, that the right of membership in a Board of Trade did not pass to the assignee, though having a pecuniary value, (*In re Sutherland*, 6 *Bissell*, 526;) but that case was

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*In re Martin Gallagher and Daniel Lane, Bankrupts.*

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not a case of a right of a purely business character. The element of personal choice of associates constituted a part of the basis of the membership. That element is wanting here. It is not to be presumed that any such consideration would or could affect the action of the city in giving or withholding its assent to an assignment. In an unreported case in this District, Judge Blatchford refused to make an order for the sale at auction of a seat in the Stock Exchange, solely, however, on the ground that he would not permit a public sale to be made under the sanction of the Court, in a case where the assignee could not undertake with the purchaser to deliver the thing sold. The question raised in this case was not determined, and that case was more nearly analogous to the case of *In re Sutherland*, (*supra*,) than to the present case. The inclination of the Courts, in dealing with the question as to what passes by an assignment under bankrupt laws, has been to give a most liberal construction to it, for the benefit of creditors, in order to carry into effect their obvious purpose and intent. Thus, under the bankrupt law of 1800, it was held by the Supreme Court, reversing the decision of Mr. Justice Washington, that a claim against a foreign Government, though a mere possibility of recovering through the future voluntary action of such Government, was property that passed under the Act. Technically, it was nothing which the law, for many purposes, could recognize as having any existence as property, yet it was within the purview of the Act. (*Vasse v. Cormegys*, 4 Wash. C. C. R., 571, and 1 Pet., 193; and see *Williamson v. Colcord*, 13 Nat. Bkcy. Reg., 319.) I see no greater difficulty in the present case. It is true, that the right of the bankrupts to assign is subject to the approval of the city, but so is the right of the lessee to assign his term often so subject to the approval of the lessor. The lease, nevertheless, passes in bankruptcy, if the assignee chooses to take it. It is, also, true, that this permit or license is revocable at the will of the city. I do not think, under the circumstances of this case, this incident of the thing takes it out of the purview of the bankrupt law. The words de-

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*In re Martin Gallagher and Daniel Lane, Bankrupts.*

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noting property, in the law, as it seems to me, ought not to be technically construed. There is an existing valuable right, perhaps, it may be called a chose in action or existing contract, of value, which, except in case of possible action by the city, would continue to be in their hands, and has, in fact, continued to be, for all practical purposes, business capital. To allow the bankrupts to hold it, would encourage such debtors as should be disposed to defraud their creditors to make similar arrangements with their landlords, and thus lock up their business capital for their own use, permanently, and make the bankrupt law, so far as they are concerned, a farce. It is suggested, on behalf of the bankrupts, that any order the Court may make, will be a *brutum fulmen*; that the bankrupts are at liberty to procure, at any time, the revocation of their license, and the grant of a new license to some person friendly to them; and that this would defeat any action their assignee in bankruptcy may propose to take to realize on this asset, if it be such. It is enough to say, in relation to this suggestion, which, indeed, I do not understand to be, in any sense, a threat of what the bankrupts intend to do, but only an argument, from what they may, as it is claimed, lawfully do, that the consequences of any interference with the action of the assignee or the Court, in turning into money what is held to be property, whether such interference is direct or indirect, are likely to be very unpleasant. Such interference as is suggested, if it were attempted, would, of course, subject the bankrupts to proceedings for contempt. The motion is granted."

Thereupon, on the 7th of May, 1879, the District Court made an order that the bankrupts, and each of them, appear before the register in charge, and severally, but at the expense of the assignee, execute and deliver to him an assignment, in the usual form required by said city, of all the right, title and interest which they may have had on the 4th of June, 1878, in and to the stand Numbers 4 of 305, 306 and 307, 33, 35 and 37, Country Row, in Washington Market, New York city, occupied by them, and also in and to the

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*In re Martin Gallagher and Daniel Lane, Bankrupts.*

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license or permit to occupy the said stand, theretofore issued or granted to them by the city and county of New York, and that they also deliver said license or permit to the assignee. Subsequently, on the 26th of May, 1879, the District Court made a further order, as follows: "The annexed paper, having been submitted to the Court as a proposed form of assignment, to be executed and delivered by the bankrupts to the assignee, in pursuance of the order made herein on the 7th of May, 1879, (such paper being as similar to the usual form of transfer of market stands as the circumstances will permit of,) and the said bankrupts having objected to the said form because of the request to the city authorities contained therein, it is ordered that such objection be overruled, and that the bankrupts execute the aforesaid paper as required by said order." The following was the paper annexed: "The undersigned, owners of stand known and designated as numbers 33, 35, 37, Country Row, West Washington Market, request that a permit may be issued for the same, in the name of Horace W. Day, assignee, and respectfully apply for permission to have such transfer made, and that the stand may be occupied for the sale of fruits." "Whereas, the undersigned were, on the 4th day of June, 1878, duly adjudicated bankrupts by the District Court of the United States for the Southern District of New York, and Horace W. Day was thereafter duly elected and confirmed as assignee of their estate, which office was accepted by him, and, whereas, by an order of said District Court, duly made and entered on the seventh day of May, 1879, the undersigned were ordered and directed to execute and deliver to said assignee an assignment of all the right, title and interest which they, or either of them, had in and to the stand and permit hereinafter mentioned, on said fourth day of June, 1878, now, therefore, in pursuance of said order, we do hereby assign, transfer and set over unto said Horace W. Day, assignee, all the right, title and interest which we, or either of us, had, on said fourth day of June, in and to that certain stand known and designated as numbers 33, 35, and 37 West Washington Market, the par-

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*In re Martin Gallagher and Daniel Lane, Bankrupts.*

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ticulars of our ownership of said stand being as follows: Right acquired by purchase. Permit issued by Comptroller A. H. Green. T. F. Devoe, Superintendent of Markets. In the name of Gallagher & Lane. Occupied for sale of fruits. Rent, per week, as paid to present collector, \$13 50. Witness our hands."

The bankrupts, after executing the papers provisionally, applied to this Court, by petition, for a review of said orders, alleging that the license was not property to which the assignee in bankruptcy became entitled.

*Gershom A. Seixas*, for the bankrupts.

*Scudder & Carter*, opposed.

BLATCHFORD, J. I think the bankrupts are estopped, by the facts shown, from asserting that the right enjoyed by them under the paper signed by the Comptroller, dated September 27th, 1873, is not property in their hands. It may require the execution on their part of such papers as they have executed, dated May 28th, 1879, and the written permission of the Comptroller that such right be transferred, before the property is in such a condition that its salable value can be realized. But, such value, when realized, will be the proceeds of the property of the bankrupts, owned by them when the petition in bankruptcy was filed, quite as much as an equal sum of money to be now received by them for the salable value of such right, on its transfer by them, with the permission of the Comptroller, would be the proceeds of such property. That the latter would be the proceeds of such property, I cannot doubt. I concur in the views of Judge Choate in his decision, and am of opinion that the order of May 7th, 1879, and the order of May 26th, 1879, were proper orders. The prayer of the petition of review is denied.

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The E. H. Coffin.

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## THE E. H. COFFIN.

A steamer, which is bound to keep out of the way of another steamer approaching so as to involve a risk of collision, has no right to attempt to pass to the left, unless there is an imperative necessity for it, if that involves a change of course or speed by the other, until she has obtained the consent of the other to such a movement.

(Before WAITE, Ch. J., Southern District of New York, June 23d, 1879.)

THIS was an appeal by the libellants, in a suit *in rem*, in Admiralty, from a decree of the District Court, dismissing the libel. The facts found by this Court were as follows: "In the afternoon of August 21st, 1874, a collision occurred between the steam-tug Samuel J. Christian, owned by the libellants, and the steam-tug E. H. Coffin, about opposite pier 4, East river, New York, and between four and five hundred feet from the end of the pier. The tide was high water slack, and the weather pleasant. The Christian had been lying at pier 6, East river, with her bow to the pier and her stern out, waiting employment. Noticing a signal for a tug from a vessel in the North river, about in the range of Bedlow's Island, she backed out into the East river, and headed for the vessel. She got straightened on her course about opposite pier 5 and between four and five hundred feet out in the river. A tug, with a canal-boat in tow, bound for pier 3, was just passing on the inside of her, and the tug William Beard, on her way to get the tow of the vessel which had the signal flying, was outside, near by. The Christian had on her full head of steam. The Coffin had come from 35th street, North river, bound for pier 17, East river, and rounded the Battery two or three hundred feet off the ends of the piers. When between piers 2 and 3, she discovered the Christian, and gave one blast of the whistle, to pass to the right. This was not heard on the Christian. The Coffin was, at the time, heading on a course which crossed the bow of

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The E. H. Coffin.

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the Christian. The Christian did not discover the Coffin until she had herself got straightened on her course. She was then further out in the stream than the Coffin and, consequently, had the Coffin on her starboard side. She gave two blasts of her whistle, to pass to the left, but did not then stop her engine or change her course. The Coffin was, at the time, about off pier 3 and the Christian about off pier 5, the Coffin still heading on a course crossing that of the Christian. The Coffin answered the signal with one blast of her whistle, and kept her course and speed. The Christian then stopped and backed her engine, but did not change her course, or get under sternway, before the collision occurred. The Coffin did not change her course, or slacken her speed, until just before the vessels came together, when she ported her wheel and backed her engine, but her course was not materially changed or her speed slackened. When the Christian stopped and backed she could not, by keeping on and porting her wheel, have passed to the right without a collision probably more dangerous than that which actually occurred."

*W. R. Beebe and F. A. Wilcox*, for the libellants.

*R. D. Benedict*, for the claimant.

WAITE, Ch. J. From the evidence, it is clear, to my mind, that, when the Coffin was discovered from the Christian, the vessels were headed on courses which crossed the bow of the Christian. The Coffin was, undoubtedly, inside the Christian, and, had she been going directly up stream, no collision would have occurred. The Christian, being intent on securing her tow, and competing with the Beard, evidently bent on the same purpose, was, possibly, less observant of the actual movements of the Coffin than she otherwise would have been. She was anxious to pass by the left, and promptly signalled her wishes to that effect. The Coffin as promptly signified, in reply, her desire to keep her course to the right,

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The E. H. Coffin.

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and, in doing so, but repeated her former signal, which had not been heard by the Christian.

As the Christian had the Coffin on her starboard side, approaching so as to involve a risk of collision, it was the duty of the Christian to keep out of the way, and of the Coffin to hold her course. The obligation of the Coffin to keep her course was as imperative as that of the Christian to keep out of the way. The Christian, in making her calculations, was bound to act on the understanding, that the Coffin need not change her course unless she chose. There can be no doubt, that, if the Christian had promptly ported her wheel, she would have passed to the right in safety. She preferred passing to the left, and kept on, without changing her course or speed, or obtaining the consent of the Coffin to change hers, until the two were so close together, that a collision was inevitable. A steamer which is bound to keep out of the way of another approaching so as to involve a risk of collision, has no right to attempt to pass to the left, unless there is an imperative necessity for it, if that involves a change of course or speed by the other, until she has obtained the consent of the other to such a movement. The Christian was guilty of a palpable violation of this rule. There was no difficulty whatever in her passing to the right, or, if she preferred, in stopping until the Coffin had crossed her bow. Instead of that, she kept on until the Coffin declined to permit her to go to the left, and then it was too late. This was the sole cause of the collision, and the judgment of the District Court was right.

Let a decree be prepared dismissing the libel.

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The Adriatic.

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## THE ADRIATIC.

A bill of lading for coir yarn in bales, shipped by a steamer from Liverpool to New York, receipted for the bales as "in good order and well conditioned," and described them as "in transit" from another steamer. They were, apparently, in good external order. The voyage was ten days. The bales, when discharged, appeared to have been, at some time, wet with sea water. The yarn inside was damp to the touch, discolored, and unfit for use to make fine goods. The bales were properly stowed, and nothing appeared as to how they could have been damaged on the steamer. There was no evidence as to the condition of the bales when shipped. On a libel, in Admiralty, against the steamer, to recover for the damage: *Held*, that the libellant could not recover, because he had not shown that the goods were damaged while on board of the steamer.

(Before WARR, Ch. J., Southern District of New York, June 28d, 1879.)

THIS was an appeal by the libellants from a decree of the District Court, in a suit *in rem*, in Admiralty, dismissing the libel. The following facts were found by this Court: "On the 20th of October, 1875, two hundred and fifty bales of coir yarn were shipped on the steamship Adriatic, consigned to the libellants, in New York. Coir yarn is the fibre of the cocoanut husk, made into strands of yarn, and put up in hanks. The hanks are put in bales, compressed, covered with burlap wrappers, and wound around with iron hoops from end to end. Coir yarn is used for making mats. The bill of lading signed by the agent of the ship at Liverpool, receipted for the bales, in the usual form, as "shipped in good order and well conditioned." The goods were described as "two hundred and fifty bales coir yarn, in transit from steamer Macedonia," and were to be delivered "in like good order and well conditioned." The bill of lading also contained this clause: "Weight, contents, quality, condition, quantity and value unknown, and ship owner not accountable for the same." At the time of the shipment, the bales were, apparently, in good external order and condition. The ship sailed

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The Adriatic.

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from Liverpool October 20th, and arrived in New York October 30th, making her voyage in about ten days. When the bales were landed in New York, one hundred were found to have been wet at some time with sea water. The wrappers were somewhat stained and discolored, and the hoops rusty. On cutting the wrappers and examining the yarn, it was found to be damp. It was not wet enough to drip, but the dampness was perceptible to the touch. It was, to some extent, discolored and unfit for the manufacture of fine goods, to which it was, on account of its quality, originally adapted. The bales were landed upon a dry and covered dock. The bales were all well and properly stowed in the lower hold of the ship. No other goods came out of the vessel wet. There was no appearance of a leak, and the hatches were all in good order and well secured, so as to be impervious to sea water, when the ship arrived. There was no evidence as to the condition of the bales when shipped, other than that which was contained in the bill of lading. It was not shown how long they had been "in transit" when the shipment was made. Neither was it shown from what place the original consignment was made, nor whether the bales had been specially exposed to sea water, either while on the voyage from Liverpool to New York, or before. There was nothing in the appearance of the yarn to indicate that the wetting might not have occurred before the delivery to the Adriatic."

*Francis Howland*, for the libellants.

*C. E. Souther*, for the claimant.

WAITE, Ch. J. The receipt in the bill of lading is an admission that the goods were, when received, in apparent good order, but it is not conclusive as to their actual condition. It makes a *prima facie* case against the ship, and gives the libellants a right to recover, unless this case is overcome by the evidence. The burden of the admission rests upon the ship, until it is shown that the condition and appearance of

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The Adriatic.

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the goods at the time of their discharge are consistent with the actual existence, in the packages, of the cause of the damage when the shipment was made, without discovery by the ship's agents, acting in good faith, and with ordinary care, while taking the cargo on board. There is, here, no question of estoppel. The bill of lading has not been assigned, and it does not appear that any advances have been made on the faith of it. The parties and their rights are precisely the same as they were when the receipt was signed.

The evidence is, as I think, sufficient to shift the burden of proof from the ship to the libellants. The goods were received while "in transit," and from another ship. They might have been exposed to sea water while on their way to Liverpool, and still the damage such as not necessarily to attract attention as the transfer was made from ship to ship. It was only about ten days from the time of the shipment in Liverpool to the discharge in New York. When the bales were discharged, there was no appearance of recent exposure. The wrappers were discolored and the yarn was damp. No water dripped from any of the packages, and no attempt seems to have been made to ascertain whether any could be brought out by pressure. Certainly, it is to be presumed that such an attempt would have been made, if the indications were such as to make it reasonable. No other goods were wet, and there was no appearance of any leak in the ship. There was no water to be seen in the hold where the goods were stowed, and none of the other cargo appears to have been damp, even.

Under these circumstances, it seems to me clear, that the libellants, before they can recover, must prove that their yarn was actually free from wet or dampness when it went on board. The damaged appearance of the yarn when it came out, is a circumstance to be taken into consideration in their favor, but it is not, of itself, sufficient, in my opinion, to overcome the effect of the other facts, which are clearly established by the evidence.

The judgment of the District Court was right, and a decree may be prepared, dismissing the libel.

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The Havre.—The Scotland.

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## THE HAVRE.—THE SCOTLAND.

Where there has been a collision between two sailing vessels, and one of them was on the privileged tack, and the other alleges that the former was in fault for keeping her course, she must show that there was time for the former, after the risk of collision was apparent to her, to avoid the collision by changing her course; and, in this case, the latter having been in peril, the failure of the former to take a step in *extremis* of that character, was held not to have been a fault.

(Before BLATCHFORD, J., Southern District of New York, June 24th, 1879.)

THESE were cross libels, filed in the District Court, for a collision between the ship Havre and the bark Scotland. That Court (1 *Benedict*, 295) decreed that both vessels were in fault. The Havre appealed. The facts found by this Court were as follows: "The ship Havre was, at about nine o'clock, P. M., of January 20th, 1866, proceeding on a voyage from Malaga, in the kingdom of Spain, to the port of New York. The position of the ship, at that time, was about thirteen miles south by east of the light-ship off Sandy Hook. She was then on pilot ground, and in charge of a licensed Sandy Hook pilot. All the officers of the Havre and her entire crew, which consisted of twenty men, all told, (such being a full crew for the said ship), were on deck, a lookout properly stationed, and her lights, as established by law, properly set and burning brightly. The night was clear and starlight, and a ship's light could be seen at a distance of from two to three miles. The wind was from west north-west to north-west by west, fresh, and the sea moderate. The Havre was heading about south-west, by the wind, (*i. e.*, close-hauled), and was on her starboard tack. She had been on such tack since about half-past eight P. M., and continued on that tack until the collision occurred. The Havre was under the following sails, viz., full maintop-sail, two reefs in the mizzentop sail, one reef in the foretop sail, full foresail, foretopmaststay sail, and full

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The Havre.—The Scotland.

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mizzen or spanker. Her speed was about eight knots per hour. At the time and under the circumstances above referred to, the lookout on board the Havre reported a green light about two points on her lee bow, and the pilot and officers of the Havre immediately took its bearing, viz., south south-west, and distant between two and three miles. It proved to be the starboard light of the bark Scotland, on her voyage from Apalachicola, in Florida, to the port of New York. The Scotland was then on her port tack, and heading about north by east, by the wind, and moving at a speed of about two and a half knots per hour. The green light of the Scotland continued in sight for about ten minutes, when her red light came in view and continued in sight for about three or four minutes, when it suddenly disappeared and her green light alone remained in view, the Scotland luffing up in the wind and trying to cross the bows of the Havre, when the collision immediately followed, the Havre's jibboom striking about the middle of the starboard mizzen rigging of the Scotland. The Scotland then slewed round to the southward, and, after remaining in contact for some time with the Havre, got clear. From the moment the green light of the Scotland was first seen to the moment of collision, the pilot, the first officer and the lookout of the Havre continued to watch the said green light and the red light of the Scotland, as they respectively came into view, and, during all such time, the Havre was kept steady on her course. The Scotland was under shortened sail, and had on board a deficient crew, which only consisted of five seamen besides two mates and a cook, whereas she ought to have had eight seamen. Had the Scotland continued her course when her green light was first seen, she would have cleared the Havre by crossing her bows and weathering her, and, had she continued her course when her red light came into view, she could have also then cleared the Havre by falling off a little to leeward, and passing astern of the Havre. Her second change of course, however, (by which she presented her green light again), luffing up in the wind, and trying then to cross the bows of the Havre, caused the

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The Havre.—The Scotland.

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collision. After such second change of course there was nothing which could have been done on board the Havre to avoid the collision, as but a minute or two elapsed between the change of course and the collision. The lookout on the Scotland was negligent in not discovering the lights on the Havre sooner than he did, and, as matter of fact, he did not discover them until within about one-eighth or a quarter of a mile off."

*Joseph Larocque*, for the Scotland.

*Charles M. Da Costa*, for the Havre.

BLATCHFORD, J. The libel against the Havre was filed February 5th, 1866. The libel against the Scotland was filed February 9th, 1866. They are cross libels for a collision which took place between the two vessels during the night of January 20th, 1866. The answers of both vessels were filed April 7th, 1866. The Scotland was bound from Apalachicola to New York; the Havre from Malaga to New York. The place of collision was in the Atlantic Ocean, from 10 to 15 miles southerly and easterly from Sandy Hook. The District Court found the Scotland in fault for not having sooner discovered the green light of the Havre. The Scotland was on the port tack, heading north by east. The Havre was on the starboard tack, heading about south-west. The wind was about north-west by west. It was the duty of the Scotland to keep out of the way of the Havre. The Havre discovered the green light of the Scotland about two points on her port bow, some two miles off and about 15 minutes before the collision. The Scotland did not discover the green light of the Havre until the vessels were not over a quarter of a mile apart. The Scotland was going not over 3 knots an hour, the Havre 8. The Havre struck the starboard side of the Scotland some 15 feet from the stern of the Scotland. In the District Court it was contended for the Scotland, that, while the Havre was passing to leeward of the Scotland, she luffed

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The Havre.—The Scotland.

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up into the wind from about abeam of the Scotland, and had her sails shaking when she struck. The District Court discarded that view, and held, that the Havre kept her course by the wind from the time she discovered the green light of the Scotland, and that the Scotland was crossing the track of the Havre, in front of the Havre, when struck by the Havre. The District Court held, that the Scotland, being on ground frequented by vessels, and being under short sail and moving at a low rate of speed, and, therefore, unable to obey her wheel promptly, and being on her port tack, was bound to exercise great vigilance in looking out for approaching lights, so as to be able to take timely measures to keep out of the way of all crossing vessels on the starboard tack; and that, if she had exercised proper vigilance, she would have sooner discovered the green light of the Havre, and could, without difficulty, have kept out of her way. But the District Court held the Havre also in fault. From the time the green light of the Scotland was first seen by the Havre, it continued in sight for from 7 to 12 minutes, no other light being visible from the Scotland to the Havre. During all that time the Havre supposed that the Scotland intended to go across the bow of the Havre, from leeward to windward. At the end of that time, the Scotland showed her red light to the Havre, whether with the entire disappearance of the green light or not is not quite clear. This produced the impression on board of the Havre that the Scotland had ported, to pass to leeward of the Havre. Soon afterwards, however, the red light of the Scotland went out of sight, and the green remained in sight, indicating to the Havre that the Scotland was not going to pass to leeward of the Havre. But the District Court came to the conclusion, that, from the time the green light of the Scotland began to reappear and her red light to disappear, there was time to have starboarded the helm of the Havre; that, if this had been done, she would have fallen off to leeward and have cleared the Scotland; and that she was in fault for not having done so. The elements making up this fault on the part of the Havre were found by

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The Havre.—The Scotland.

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the District Court to be, that the Havre was easily handled; that she was under favorable speed for the purpose; that she had no one on the lookout forward at the time the green light of the Scotland reappeared; that her lookout, who had reported the green light originally, had gone aft; that her pilot had gone to the weather side of the vessel to look after other possible sails; and that the coming into sight of the red light of the Scotland after her green light had come into sight, was notice that there might be danger and that the utmost vigilance was incumbent on the Havre. The conclusion arrived at by the District Court was, that, if the lookout had kept his post and had reported every change in the Scotland's lights as soon as each change was visible, her wheel could and would have been put up in time to have avoided the collision. The District Court, while recognizing the duty incumbent on the Havre to keep her course, because it was the duty of the Scotland to keep out of the way of the Havre, dissented, likewise, from the proposition that the Havre was bound to alter her course simply because a collision was probable. The view of the Court was, that risk of collision was apparent to the Havre for several minutes before it actually took place; that the Havre was bound to keep her course until it was apparent that the collision could not be avoided without a change on her part; that she was to be held responsible on the sole ground that, after it was clear that the only way to escape was for her to starboard her wheel, she failed to do so; and that, if she had done so, no accident would have occurred.

A careful examination of the evidence makes it impossible for me to concur in the conclusions of the District Court, as to the fault of the Havre. The Scotland has not appealed. The Havre has appealed. The decision below is, therefore, not in question so far as the Scotland was held in fault.

It is contended, for the Havre, that the time which elapsed between the showing of her green light by the Scotland the second time and the actual collision was so short, that, during that time, it was impossible for the Havre to perform any manœuvre, either to avert the collision or to lessen its effect.

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The Havre.—The Scotland.

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As the Havre was on the privileged tack, it is incumbent on the Scotland to show that the Havre could have performed such a manœuvre. Still more is this burden imposed on the Scotland when she admits her own fault by not appealing from the decree. I do not think the evidence shows that there was time, during the interval referred to, for the Havre to have effectually done anything to avoid the collision. Moreover, the Havre being on the privileged tack and bound not to do anything to baffle the Scotland in the discharge of her duty of avoiding the Havre, and the Scotland being in fault for the collision, the failure of the Havre to take a step *in extremis*, of the character insisted on, must be classed as an error of judgment only, and not as a fault. The responsible officers in charge of the Havre testify, that, being of opinion they could not avoid the collision by putting their helm either way, they held their course. Their testimony should have great weight, and there is no sufficient counter-vailing evidence.

Notwithstanding the stress laid by the Court below on the remission of vigilance on the part of the lookout and of the pilot of the Havre, I do not think it appears that these circumstances contributed to the collision. After the first light of the Scotland was reported to and seen by the officers in charge of the Havre, there was continuous and adequate observation on their part of the various lights shown by the Scotland, especially in view of the fact that the Havre discharged her duty by keeping her course.

It is impossible to attribute any fault to the Havre in respect of the rate of speed at which she was sailing. Nor is it established by the evidence that the Havre luffed up into the wind or changed her course at all.

The libel against the Havre must be dismissed, with costs to her both in the District Court and in this Court. In the suit against the Scotland there must be a decree for the libellants for the amount reported by the Commissioner as the amount of their damages, with interest as reported, and for the costs of the suit both in the District Court and in this Court.

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Grace v. The American Central Insurance Company, of St. Louis.

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## WILLIAM R. GRACE AND OTHERS

vs.

## THE AMERICAN CENTRAL INSURANCE COMPANY, OF ST. LOUIS.

G. instructed N., an insurance broker, to procure fire insurance. N. employed another insurance broker, A., who procured a policy from the defendant, and it passed to G. The policy, in clause 8, provided, that the policy might be terminated at any time, at the request of the assured, and also at the option of the insurer, on giving notice to that effect, and that any person other than the assured, who "may have procured" the insurance to be taken, should be deemed to be the agent of the assured and not of the insurer, "under any circumstances whatever, or in any transaction relating to this insurance." Afterwards the defendant notified A. of its election to then terminate the policy. A. accepted the notice and promised to return the policy. The next night the property insured was burned. G. had no knowledge, then, of the notice of termination. In a suit by G. on the policy: *Held*, that the policy was terminated by the notice.

By the terms of the policy, A. was the agent of G. for the purpose of accepting notice of the termination of the insurance.

It was competent for the defendant to show a universal custom for the insurer desiring to terminate a risk to give notice to the broker who procured the risk.

The evidence in relation to such custom being positive and uncontradicted, it was not error for the Court not to submit to the jury the question as to whether the existence of such a custom had been proved.

It was not competent for the plaintiff to show a usage that a notice to the broker did not take effect until a reasonable time had elapsed.

The plaintiff, by accepting the policy, ratified the employment of A., so as to make A. the person who procured the insurance.

(Before BENEDICT, J., Eastern District of New York, June 26th, 1879.)

BENEDICT, J. This case comes before the Court upon a motion for a new trial. The action is brought upon a policy of insurance, to recover for the destruction, by fire, of certain lumber belonging to the plaintiffs. A trial was had before the Court and a jury, when a verdict was rendered for the

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Grace v. The American Central Insurance Company, of St. Louis.

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defendant. The plaintiffs now move for a new trial, upon exceptions to certain rulings of the Court made at the trial.

The evidence shows, that the plaintiffs had instructed one Noyes, an insurance broker in New York, to procure for him insurance, to a large amount, upon a quantity of lumber. Noyes employed F. H. Anthony, also an insurance broker, to effect insurance in Brooklyn; and, accordingly, Anthony procured several policies in the name of the plaintiffs. Among them was the policy in suit, which, when procured, was passed to the possession of the plaintiffs. This policy contained the following clause: "8. This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium, for the unexpired term of the policy. It is a part of the contract, that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." A few days after the delivery of this policy, the defendant notified Anthony of its election to terminate the policy at that time. Anthony accepted the notice, and promised to return the policy. On the following night a fire occurred, by which the property insured was destroyed. At the time of the fire, the plaintiffs had no knowledge of what had taken place between the defendant and Anthony, in regard to terminating the insurance. Upon these facts the plaintiffs requested the Court to instruct the jury to find a verdict for the plaintiffs, for the amount of the policy, \$5,447 37. The request was refused, and the plaintiffs excepted. This exception presents, for determination, the main question in dispute between these parties, viz.: whether the notice of termination of the insurance given by the defendant to the broker, Anthony, and accepted by the latter

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*Grace v. The American Central Insurance Company, of St. Louis.*

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in behalf of the plaintiffs, had the legal effect to terminate the insurance. If such was the effect of that notice, the ruling in question was right. If such was not its effect, a verdict for the plaintiffs for \$5,447 37 should have been directed, as requested by the plaintiffs.

Upon this question my opinion is, that the insurance was terminated by the notice of termination given to the broker, Anthony, and that the ruling excepted to was right. The contention on the part of the plaintiffs is, that Anthony was not the agent of the plaintiffs for the purpose of accepting notice of termination of the insurance, and, therefore, the notice given to Anthony could not affect the plaintiffs' rights under the policy. The contention on the part of the defendant is, that the effect of the 8th clause of the policy, above set forth, was to enable the insurer to terminate the insurance at any time, by giving notice to the person who procured the insurance to be taken; and that Anthony was such person. The determination of this question depends upon the effect to be given to the 8th clause of the policy, above set forth. In considering this clause, it will be observed, that the apparent object of the clause is to provide a method of terminating the insurance. No other subject is specifically mentioned in it. It contains a specific provision for a termination of the insurance by the insured, which is followed by a specific provision for a termination of the insurance on the part of the insurer, by giving notice to that effect; and then follows the provision, that, in case the insurance has been procured by a person other than the insured, such person shall be deemed to be the agent of the assured, "in any transaction relating to this insurance." That terminating the risk is a transaction relating to the insurance cannot be denied; and, inasmuch as the method of conducting such a transaction is the subject to which the prior portion of the clause is devoted, the natural inference is, that the subsequent general phrase, "any transaction relating to this insurance," was intended to cover the transaction provided for in the former part of the clause, viz., a termination of the risk by means of

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Grace v. The American Central Insurance Company, of St. Louis.

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a notice to that effect. No language is to be found in any part of the policy indicating an intention to give a limited effect to the phrase, "any transaction relating to this insurance;" and, in the absence of language indicating such an intention, it is difficult to find ground on which to deny to the words used their natural significance and scope. The position taken by the plaintiffs is, that the words, "relating to the procurement of," must be supplied, and the phrase construed as if it read, "any transaction relating to the procurement of this insurance." The only ground upon which such a material addition is based is, that, without some such limit, results clearly never intended would follow from the phrase, such as, permitting the broker to cancel the policy, or, under clause 11, bind the insured in the matter of repairs by the insurer. I think reason can be found for denying to the clause in question any effect in the cases suggested and for limiting the effect of the phrase, "any transaction relating to this insurance," to the subject-matter of the clause of which it forms a part; but, however this may be, still the fact that the language, if given its ordinary significance, will work hardships under some circumstances, is no good reason for adding words of limitation not used by the parties. Provisions in policies, which are intended to, and do, render the contract of little value to the insured, are common enough. If it had been the intention of the parties that the phrase under consideration should be limited to acts relating to the procurement of the insurance, it would have been easy to say so; and no reason has been assigned for an omission to disclose such an intention by the language employed. In truth, an intention to refer to acts done subsequent to the procurement of the policy is affirmatively indicated by the words, "who may have procured this insurance." My conclusion, drawn from the language employed in the policy is, that these parties intended to agree, that, in case of an election by the defendant to terminate the risk, such termination might be effected by notice given to the broker who procured the insurance to be taken. This conclusion is strengthened by the evidence in-

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Grace v. The American Central Insurance Company, of St. Louis.

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troduced by the defendant, showing a universal custom, in cases where the insurer intends to terminate a risk, to give the notice of termination to the broker who procured the risk. The admission of this evidence was objected to by the plaintiffs, but the evidence was competent, not, indeed, to make thereby a contract for the parties, or to alter the contract that was made, or to show authority in Anthony, but to show the circumstances under which the contract was made, for the purpose of throwing light upon the intention of the parties in using the language which they employed. For this purpose, the evidence in regard to custom was competent. The fact that the language employed in clause 8, as I have understood it, tends to render the policy a contract in harmony with the usage of the trade, goes to confirm the correctness of that understanding. But, it is said, that the Court erred in not submitting to the jury the question whether the existence of such a usage had been proved. The evidence in relation to the custom was positive and wholly uncontradicted. It permitted but one conclusion, namely, that the custom contended for did exist. There was nothing, therefore, for the jury to pass on, and the Court had a right to treat the custom as a fact proved, and to construe the contract in the light of that fact.

Evidence of the practice in regard to giving notice of termination of the risk having been admitted, the plaintiffs offered to show, that when, in accordance with that practice, notice is given to the broker, the understanding is, that the notice does not take effect until a reasonable time has elapsed. This offer was rejected, and the correctness of that ruling is also called in question upon this motion. The reason for the rejection of the plaintiffs' offer was, that it was an attempt, by evidence of usage, to change the contract which the parties had made. The agreement in the policy is, that the insurance is to be terminated when notice to that effect is given. The policy does not provide for any lapse of time after the giving of the notice, during which the insurer is to be bound. On the contrary, the contract states that the insurance termi-

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Grace v. The American Central Insurance Company, of St. Louis.

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nates on giving the notice. The evidence offered by the plaintiffs was, therefore, immaterial, and the plaintiffs take nothing by their exception to the exclusion of their offer.

There remains the question, whether the evidence shows Anthony to be the person who procured the insurance to be taken, within the meaning of the 8th clause of the policy. As to this, there is no room for doubt. The only person known to the defendant, as the person procuring the insurance, was Anthony. The principals never met. Anthony procured the insurance, the policy was sent to him, and his name was endorsed upon it as the agent procuring it. The plaintiffs received the policy so procured, and are now suing upon it. It is true, the plaintiffs did not employ Anthony directly, but he employed Noyes, who, in turn, employed Anthony; and the plaintiffs, by accepting the policy procured by Anthony, ratified the employment of Anthony. They have adopted as their own the act of Anthony in entering into a contract in their behalf, one provision of which contract is, that notice of termination of the insurance, given to Anthony, should be equivalent to notice given to them.

My conclusion, therefore, is, that none of the exceptions taken at the trial afford ground for setting aside the verdict, and that judgment must be entered for the defendant.

*Winchester Britton*, for the plaintiffs.

*George W. Parsons*, for the defendant.

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*In re Ozias L. Nims and David Long, Bankrupts.*

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IN THE MATTER OF OZIAS L. NIMS AND DAVID LONG,  
BANKRUPTS.

N. and L. were copartners under the name of N. & Co. They dissolved, owing debts and having no assets. Subsequently, they formed a new partnership, under the name of N., agent, and failed, and were adjudged bankrupts, having firm assets. A creditor of N. & Co. claimed to prove against the firm of N., agent, a debt due by the firm of N. & Co.: *Held*, that he was not entitled to share in the assets of the firm of N., agent, being excluded therefrom by the provisions of § 5,121 of the Revised Statutes of the United States.

(Before BLATCHFORD, J., Northern District of New York, June 27th, 1879.)

BLATCHFORD, J. On the 23d of August, 1875, Henry T. Buell made proof in bankruptcy against the two bankrupts, setting forth that they were, before the filing of the petition in bankruptcy, indebted to him in the sum of \$26,962 07, and interest thereon from July 1st, 1871, "upon a certain promissory note made by them, the said bankrupts, by the description of O. L. Nims & Co., dated June 29th, 1871, for that amount and interest as aforesaid, and payable to the order of Buell and Whitney, on demand, after date, at the office of H. T. Buell & Co., in the city of New York." The proof set forth that said note "was given in consideration of moneys advanced by the said Buell and Whitney to the said firm O. L. Nims & Co., and of commissions earned and services performed by said Buell and Whitney for said firm." In October, 1875, the assignee in bankruptcy applied to the register in charge for an order expunging said proof of debt. The following statement of facts was agreed upon by the assignee and Buell: "The assignee having applied, in this proceeding, for a re-examination of the claim preferred by Henry T. Buell, the following are the facts conceded in regard thereto, with the proof of debt. *First*. Prior to May 13th, 1871, Ozias L. Nims and David Long were copartners under the firm name of O. L. Nims & Co. They then dissolved, Nims doing no business and Long going into partnership

with L. M. Evans, under the name of Evans & Long. When O. L. Nims & Co. dissolved they owed debts and had no assets. *Second.* August 12th, 1871, Nims and Long formed a new partnership, (neither contributing any money or assets,) under the name of O. L. Nims, agent. *Third.* O. L. Nims, agent, failed, were adjudicated bankrupts in these proceedings and made assets. The funds in the assignee's hands subject to dividend were realized from the assets of the last firm. No other objection is made to the proof of debt of said Henry T. Buell, except such as may be deduced from the foregoing facts. The issue is: Is Buell entitled to share in a dividend equally with the creditors of O. L. Nims, agent, or shall the whole fund be distributed to the creditors of the firm of O. L. Nims, agent, to the exclusion of the creditors of the firm of O. L. Nims & Co.?" The register made an order disallowing the claim and expunging it from the list of claims on the assignee's record in the case. Thereupon Buell presented a petition to the District Court, praying that said order of the register be vacated, and that said proof of debt be restored and declared entitled to share in the dividends of the assets mentioned in said statement of facts. On a hearing, the District Court, on the 18th of June, 1878, made an order, that the said determination and order of said register be overruled, vacated and set aside, and that said claim be established as a valid claim against the assets in the hands of said assignee, and entitled to dividend accordingly, and that said assignee pay the costs and expenses of the re-examination of said claim, to be taxed by said register. The assignee now presents a petition to this Court, reciting the foregoing proceedings, setting forth that said order of the District Court is erroneous, in that it appears that said Buell "was not a creditor of the firm of O. L. Nims, agent, composed of said bankrupts, and against whom the proceedings in bankruptcy were commenced and the said adjudication had, and to whose specific creditors said assets belong," and praying that said order of the District Court be reviewed by this Court.

The District Court held that the creditors of the firm of

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*In re Oziel L. Nims and David Long, Bankrupts.*

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O. L. Nims & Co. and the creditors of the firm of O. L. Nims, agent, are entitled to share ratably in all the joint assets of the bankrupts, and that neither section 5,121 of the Revised Statutes, nor the rule of equitable distribution which that section is intended to adopt, precludes the creditors of the bankrupt jointly from resorting to any joint assets of the bankrupts which may exist.

The provisions of section 5,121 of the Revised Statutes are as follows: "Where two or more persons who are partners in trade are adjudged bankrupt, either on the petition of such partners or of any one of them, or on the petition of any creditor of the partners, a warrant shall issue, in the manner provided by this title, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted. All the creditors of the company and the separate creditors of each partner may prove their respective debts. The assignee shall be chosen by the creditors of the company. He shall keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member thereof; and, after deducting out of the whole amount received by the assignee, the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there is any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock, for the payment of the joint creditors; and, if there is any balance of the joint stock, after payment of the joint debts, such balance shall be appropriated to and divided among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts. The certificate of discharge

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*In re Ozias L. Nims and David Long, Bankrupts.*

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shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone. In all other respects the proceedings against partners shall be conducted in like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different Districts, that Court in which the petition is first filed shall retain exclusive jurisdiction over the case." The rule of distribution prescribed by this section is very distinct. It is arbitrary, like many other provisions of the bankruptcy statute, but it must be followed, and cannot be made to yield to any supposed equities in favor of any other rule of distribution. Nims and Long, partners in trade, have been adjudged bankrupt. When the bankruptcy proceedings were instituted, they were partners in trade under the name of O. L. Nims, agent, and not under the name of O. L. Nims & Co. They had partnership assets as O. L. Nims, agent, and no partnership assets as O. L. Nims & Co. Their joint stock and property, taken under the warrant, was their joint stock and property as O. L. Nims, agent, that is, the joint stock and property of the copartnership of O. L. Nims, agent. No other joint stock or property could be taken, under the warrant, as joint stock or property. If there was any joint property, not the property of the copartnership of O. L. Nims, agent, the separate interest of each of the joint owners in such property could be taken as his separate estate, under the warrant, but such joint property could not be taken as the joint property of the copartnership of O. L. Nims, agent. The creditors of the copartnership of O. L. Nims, agent, and the separate creditors of each of the partners, are alone declared to be authorized to prove debts. Creditors of the two bankrupts jointly, as to matters not arising out of the copartnership of O. L. Nims, agent, are not creditors of that copartnership. As all partnership debts are, in equity, deemed joint and several, the creditors of the copartnership of O. L. Nims & Co. are separate creditors of each of the partners. The section directs that the assignee be chosen by the creditors of the copartnership, that is, cred-

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*In re Ozias L. Nims and David Long, Bankrupts.*

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itors of O. L. Nims, agent, by that copartnership name. The assignee is directed to keep an account of the joint stock or property of the copartnership of O. L. Nims, agent, and not an account of property owned by the two partners jointly, which is not the property of such copartnership by that name. He is also directed to keep an account of the separate estate of each of the two partners; and the interest of each of them in joint property which is not the property of the copartnership of O. L. Nims, agent, by that name, is separate estate. The statute further directs, that the proceeds of the joint stock or property of the copartnership of O. L. Nims, agent, shall be appropriated to pay the creditors of that copartnership. All the assets in this case are the proceeds of the joint property of such copartnership. They cannot go to pay the creditors of the copartnership of O. L. Nims & Co. The creditors of the copartnership of O. L. Nims & Co. are not creditors of the copartnership of O. L. Nims, agent. It is only when there shall be a balance of the joint stock of the copartnership of O. L. Nims, agent, after paying the joint debts of such copartnership, that such balance can be divided among the separate estates of the two bankrupts, so as to be applied to pay their separate debts as members of the copartnership of O. L. Nims & Co.

It is suggested, that the language of section 5,121 does not in terms prescribe the rule of distribution when debts are proved against the bankrupts jointly, which are not partnership debts, but that that section deals only with the mode of distribution as between partnership creditors and creditors of the partners separately, and, where the rights of those classes of creditors are involved, applies the equitable rule, that the joint property shall be first applied to pay the joint debts, and the separate property to pay the separate debts of the partners respectively; that the creditors of O. L. Nims & Co. are no more creditors of the bankrupts separately, than are the creditors of O. L. Nims, agent; that both classes are joint creditors; and that, as the creditors of O. L. Nims, agent, can resort to the separate property of the bank-

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*In re Ozias L. Nims and David Long, Bankrupts.*

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rupts as fully as the creditors of O. L. Nims & Co. can, the latter ought to be permitted to resort, equally with the former, to any joint assets. The answer to this suggestion is, that debts against the bankrupts jointly, as members of the firm of O. L. Nims & Co., are debts against each partner separately, and that, if there be debts against them jointly which are not debts against them severally, and are not debts of the copartnership of O. L. Nims, agent, such latter debts are outside of the provisions of § 5,121. This does not authorize the Court to treat as debts of the copartnership of O. L. Nims, agent, debts which are not debts of the copartnership of O. L. Nims, agent.

In *Forsyth v. Woods*, (11 *Wallace*, 484,) the Supreme Court had under consideration § 36 of the bankruptcy Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 534,) the provisions of which are those found in § 5,121 of the Revised Statutes. In referring to those provisions, the Court, through Mr. Justice Strong, says: "It is not certain that a promise by a partnership and a promise by the individual partners collectively have the same effect. If a firm be composed of two persons associated for the conduct of a particular branch of business, it can hardly be maintained that the joint contract of the two partners, made in their individual names, respecting a matter that has no connection with the firm business, creates a liability of the firm, as such. The partnership is a distinct thing from the partners themselves, and it would seem that debts of the firm are different in character from other joint debts of the partners. If it is not so, the rule that sets apart the property of a partnership exclusively, in the first instance, for the payment of its debts, may be of little value. That rule presumes that a partnership debt was incurred for the benefit of the partnership, and that its property consists, in whole or in part, of what has been obtained from its creditors. The reason of the rule fails when a debt or liability has not been incurred for the firm as such, even though all the persons who compose the firm may be parties to the contract." The rule thus referred to by the Court is the arbitrary rule of

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*In re Ozias L. Nims and David Long, Bankrupts.*

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the bankruptcy statute of the United States. The District Judge, in his decision in the District Court, says, that, after a very careful reading of the books, he is unable to find any case in this country or in England, except the case of *Forsyth v. Woods*, which advances the view thus advanced in that case. He adds: "That this is not the foundation of the rule which gives partnership creditors priority over separate creditors as to the joint property, seems to be indicated by the cases which postpone the partnership creditors when there has been a conversion of joint into separate property. It is well settled, that partners may, during the continuance of the partnership, by agreement, convert joint into separate estate, or *vice versa*. This conversion determines the character of the property for the purposes of its distribution in bankruptcy. Accordingly, when one partner, without fraud, sells out to the other, the property becomes separate property, and the creditors of the firm are postponed to the separate creditors of the purchasing partner. If the rule of distribution is founded on the theory that the fund which is derived from the creditors is primarily the fund for their payment, and the law therefore appropriates it to them, it could not be permitted that the debtors themselves, by agreement, should defeat this result." The remarks of Mr. Justice Strong, in *Forsyth v. Woods*, are not understood to go any further than to say, that, under the bankruptcy statute, if there are partnership debts and partnership assets, it will be presumed that such assets were obtained from the partnership creditors, so that, if such assets remain to be administered in bankruptcy, they shall be applied first to pay debts of the partnership. This rule of distribution is a statutory one, and applies only to partnership assets which remain such to be administered in bankruptcy. There was never any statute in England, in terms like our statute, during the time the English decisions referred to were made. Those decisions proceeded on a general equitable idea, that creditors of joint debtors who were in fact partners should be allowed to share in the assets of the partnership, although not creditors of the partnership, or in respect

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*In re Ozias L. Nims and David Long, Bankrupts.*

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to any matter growing out of or connected with the partnership. Hence, the decisions in England, of which the case of *Hoare v. The Oriental Bank Corporation*, (*L. R.*, 2 *Appeal Cases*, 589,) is a recent instance, holding that a joint debt, not shown to have been incurred as a partnership transaction, and as arising out of partnership business, could be proved against the partnership estate, where the partners were the joint debtors. In this last case, it was suggested as a ground for allowing the proof, that the creditor could, before the insolvency, have sued the debtors composing the partnership, jointly, upon the obligation held by him, and, upon recovering judgment, have taken out execution against the partnership assets. But there was no such controlling statutory rule as the one of our statute.

The provisions of our bankruptcy statute, in the matter in hand, are like those of the Massachusetts insolvency law of 1838, *ch.* 163, § 21. Under that law, it was held, in *Ex parte Weston*, (12 *Metcalf*, 1,) that only partnership debts could come against partnership assets. (See, also, *Somerset Potters Works v. Minot*, 10 *Cushing*, 592.)

It follows, that the order under review must be reversed and vacated, with costs. The same decision is made in the case of *Blackmar*.

*William H. Greene*, for the assignee in bankruptcy.

*Sherman S. Rogers*, opposed.

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The Southern Home.

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## THE SOUTHERN HOME.

A vessel bound to keep out of the way of another vessel, and having no lookout, was, in this case, held to be not in fault for a collision between the two vessels, because the case was one of inevitable accident.

The yellow fever having disabled most of her crew, which was adequate, it was proper for her to pursue her voyage, without putting back or seeking an intermediate port or anchoring, her precautions, with the remaining crew, being reasonable.

(Before WAITE, Ch. J., Southern District of New York, June 30th, 1879.)

THIS was an appeal from a decree of the District Court, dismissing the libel, in a suit *in rem*, in Admiralty. This Court found the following facts: "About four o'clock in the morning of the 22d of September, 1875, a collision occurred between the German bark Bremen, owned by the libellants, and the British schooner Southern Home, three or four miles to the eastward of the light ship, off Sandy Hook. The Bremen was bound on a voyage from Bremen to New York, and the Southern Home from San Domingo to New York. The wind was somewhat west of north, and both vessels were beating in to New York, the Bremen being on her starboard and the Southern Home on her port tack. Both vessels were steering by the wind, and close hauled. The weather was fine, and the moon shining brightly. The sea was tolerably smooth, and the wind steady, at a five or six knot breeze. Both vessels had their regulation lights set and burning brightly. The Bremen was well manned and found, and her lookout, who was on duty, discovered the green light of the Southern Home off his port bow, when the vessels were a long distance apart. He promptly reported it, and the Bremen was kept steadily on her course. There was no fault whatever in her navigation. She had taken a pilot on board about noon of the previous day, to bring her into New York, and he was, at the time, in charge. The Southern Home left San Domingo on the 31st of August. She was staunch, strong

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The Southern Home.

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and well equipped. Her crew consisted of eight men, all told, to wit, the captain, first and second mates, three able seamen, one ordinary seaman, and a steward. This was sufficient. The steward was not well when the vessel sailed and off duty, but he kept around until about half an hour after they got over the bar, when he went to his bunk. When the vessel was well outside and had everything set, the captain left the wheel and went below, to see him. He appeared to have a fever, but the captain did not then know it was yellow fever. It afterwards proved to be such, and the steward died the seventeenth day out. The ordinary seaman was taken down the evening after the vessel sailed, and the captain the day after. On the fourth day out, two of the able seamen were taken, and, on the 13th of September, the mate. The last seaman was attacked the day after the steward died. The disease was yellow fever. The second mate was then the only well man on board, and he navigated the vessel alone and in safety until the night of the collision. No attempt was made to put into any port on the way, or to go back to San Domingo. No vessel was signalled on the voyage, within signalling distance, and no signal of distress had been displayed. On the night of the collision, the second mate was alone on deck until about three o'clock in the morning. All sails were set, except the outer jib, and the foresail had a reef in it. The second mate set the gaff topsail alone two days before. The foresail was reefed before the mate was taken sick. With the exception of the gaff topsail, all the other sails had been set a long time. About three o'clock in the morning of the 22d, the second mate, who had been thirty hours continuously on deck, navigating the vessel alone, went below and called one of the seamen, who appeared to be better than the others, to come up and steer, while he went into the cabin to get a little sleep. The man had strength enough to keep the vessel steady on her course, with the weather as it was, but could do but little more. He was instructed to call the second mate at daybreak, or before, if he saw anything, and to keep the course she was then on, steer-

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The Southern Home.

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ing by the wind. The second mate then went into the cabin, and lay down on the floor to sleep, about twelve feet from the man at the wheel. It was too cold to lie down with safety on the deck. The captain was in his berth in the cabin, at the time, unable to sleep, on account of his anxiety about the vessel. After the second mate had been asleep about half an hour, he was awakened by a faint call from the man at the wheel, and went immediately on deck. When he got there, the man at the wheel called his attention to a vessel near by, pointing with his finger. He was too weak to speak so as to be understood. The mate went to the leeward, and saw a vessel and her red light a few lengths away, and immediately ordered the wheel to port, and ran to help put it over, as the man was too weak to do it alone. As soon as the wheel was over, he ran and let go the main sheet, but, notwithstanding this, the collision occurred. All was done that could be to avoid the accident, after the second mate came on deck, and no fault was committed. The captain heard the call to the second mate from the man at the wheel, and crawled on his hands and knees to the deck, but was too weak to sit up or render any assistance. All the men were on deck who were able to be there. The Southern Home was kept steadily on her course until the second mate came on deck. A collision was then unavoidable. The second mate heard a hail from the Bremen after he got on deck. About an hour before the collision, the vessel had reached good anchorage ground on the New Jersey coast, but, if the anchor had been let go, it could not have been raised, in case of necessity, for want of a sufficient crew. When the second mate went below there were no vessels in sight, and there was, apparently, nothing to prevent an early completion of the voyage, in safety. The Southern Home struck the Bremen almost head on, at the mizzen rigging, doing much damage. After the collision, a tug was procured, and the Southern Home towed to the quarantine. All on board, except the captain, second mate and one seaman were taken to the hospital. The captain remained on board. The three seamen were discharged cured,

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The Southern Home.

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September 30th; and the mate, October 4th. One of the men went back again October 13th, and was again discharged October 22d."

*William Allen Butler*, for the libellants.

*Robert D. Benedict*, for the claimant.

WAITE, Ch. J. There is here no dispute as to facts. The simple question is, whether, upon the facts as they are substantially conceded to be, a case of inevitable accident has, in law, been made out. As between the two approaching vessels, it was the duty of the Southern Home to keep out of the way, and the collision was, no doubt, due solely to the fact that she had no lookout. The burden of excusing this fault is on her.

It is said, by the Supreme Court, in the case of *The Grace Girdler*, (7 Wall., 196, 203,) that "inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable, under the circumstances." The Southern Home was pursuing a lawful avocation. She sailed from a sickly port, bound for a more healthy one, having on board what appeared to be a sufficient crew. While the steward was complaining, there was nothing in his case to indicate special danger. A vessel once out of port, with a full complement of men, is not always required to put back if sickness afterwards appears. Neither must she, under all circumstances, seek an intermediate port for relief. All such matters are left to the considerate judgment of those in command at the time, and, if they act with reasonable prudence, in reference to the preservation of life and property, they are not to be charged with fault simply because an accident afterwards happens, that might have been avoided if another course had been pursued. In this case, the vessel was bound for a northern port,

where there was every reason to believe the disease with which her crew was afflicted could be treated under more favorable circumstances than at the one she had left, or any other she could have entered on her way up. That there was no absolute necessity for putting back when the sickness broke out, is shown by the fact, that the vessel was safely navigated with her disabled crew until she had almost reached her port of destination, and that only one of her crew died on the way. All those who reached New York recovered soon after their arrival. It is not reasonable to suppose that more could have been accomplished in the way of saving life, if anything else had been done. An attempt to enter another port would have exposed the vessel to dangers similar to those she encountered while approaching New York. A collision with the Bremen would have been avoided, but another might have occurred. To my mind it is clear, that, under the circumstances, it was not a fault to continue the voyage without putting back or turning aside for relief.

The whole case, as it seems to me, depends upon what occurred at or immediately before the collision. The vessel was then nearing her port of destination. The weather was fine, the sea smooth, and the wind such as to make it easy to navigate her. This is shown by the conceded fact, that the sick man at the wheel, too weak to speak aloud and scarcely able to sit up, could keep her steady on her course. All sails were set, but they were no more than could easily be carried. All she actually needed, more than she had, was a lookout. Had there been one at his post, it is almost certain there would have been no collision. If she had anchored or hove to in that unusual place, a lookout would have been as necessary as if she had been sailing. In short, so long as she could be steered, it was nearly or quite as safe for her to go on without her lookout, as it would have been to lie still. If she had come to anchor, there was no crew to raise it, should that become necessary. But, in all cases like this, some attention must be paid to the natural instincts of mankind. The second mate, almost exhausted by his days and weeks of watch-

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The Southern Home.

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ing and anxiety, was where he saw relief nearly at hand. It would be inhuman to charge him with fault in keeping on instead of anchoring or heaving to, in the midst of the circumstances which then surrounded him. There was no other vessel in sight when he went below, and he left strict orders to be called if anything appeared. He was prompt to answer the call as soon as it came, and, in seeking his expected hour or two of sleep, he was but preparing himself for the more active work which would probably be required of him when he got nearer the entrance of the harbor. He displayed no signals of distress, because, until the Bremen appeared, there was no one to see them, and, when she did appear, there was no one to make the display, any more than there was to notice her light when it was near enough to be seen. When the second mate came on deck he did everything that could be done. As soon as he found out why he was called he put the wheel to port and let go the main sheet. It was not seriously contended, on the argument here, that this was wrong, or that anything else could have avoided the collision which was then imminent.

I am entirely satisfied with the correctness of the decree below, and an entry may be prepared dismissing the libel, with costs.

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Prime v. The Brandon Manufacturing Company.

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DAVID W. PRIME AND OTHERS

v8.

THE BRANDON MANUFACTURING COMPANY. IN EQUITY.  
ORIGINAL BILL.

THE BRANDON MANUFACTURING COMPANY

v8.

DAVID W. PRIME AND OTHERS. IN EQUITY. CROSS-BILL.

Where an assignment of a right under a patent refers to the patented improvement as being in use by a certain party, such reference is express information to the assignee of the fact of such use; and, the party referred to being in possession to the extent of such use, such possession is constructive notice of the claim of right under which the possession and use are had.

An assignment of a patent by a bankruptcy Court to the assignee in bankruptcy of the bankrupt owner of the patent need not be recorded in the Patent Office, in order to prevail over a recorded assignment of the patent from the administrator of the bankrupt, made after the bankruptcy, as, by § 5,046 of the Revised Statutes of the United States, all patent rights of the bankrupt vest at once, by operation of law, in the assignee in bankruptcy.

A patentee, during the original term of his patent, parted with his right to an extension, and agreed to sign all necessary papers to secure the extension for the benefit of his grantee. Afterwards, for the purpose of showing to the Patent Office that he would own the extension, if granted, the full title to the extended term was conveyed to him, before the extension was granted. The extension would not otherwise have been granted. The grantee paid all the expenses of obtaining the extension, and all parties understood that he really was to own the extended term: *Held*, that the original instrument was binding, in equity, on the patentee; that the equitable right to the extended term was in the grantee; that, as the conveyance back to the patentee was made to deceive the Patent Office, it was inoperative; but that, as the original grantee of the right to the extension could not claim the extension except by availing himself of such inoperative instrument, the Court would leave the parties where it found them.

The special Act of Congress, of July 15th, 1870, (16 *U. S. Stat. at Large*, 657,) authorizing an application for an extension to be made to the Commissioner of Patents, did not vary the positions or rights of the parties.

No costs allowed, on dismissing a bill and a cross-bill.

(Before WHEELER, J., Vermont, July 2d, 1879.)

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Prime v. The Brandon Manufacturing Company.

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WHEELER, J. This original bill is brought for relief against an alleged infringement of the extended terms of letters patent No. 14,119, dated January 15th, 1856, and No. 24,162, dated May 24th, 1859, and No. 25,148, dated August 16th, 1859, issued to Francis M. Strong and Thomas Ross, and of letters patent No. 35,348, dated May 20th, 1862, issued to John Howe, Jr., assignee of Strong, Ross and himself, all for improvements in weighing scales, and which the plaintiffs claim to own. The defendant admits use of the patented inventions, but claims ownership of them and the right to use them, and has filed the cross-bill, for a conveyance of such title as the defendants therein may have, and for relief against the setting up of title by the plaintiffs to the customers of the defendant, to the damage of its business, and the cause has been heard upon pleadings, proofs and argument of counsel.

The plaintiffs derive title from Strong and Ross, by a general release and assignment from Ross, of all his right, title and interest to such patents and extended terms, to Strong, dated March 31st, 1874, and a further like release and assignment, "excepting only such part of their interest as John Howe, Jr., assigned to the Howe Scale Company," dated September 15th, 1875; by an assignment from Strong to Prime, of all his right, title and interest to the patents and extended terms, but reserving a contingent interest in the profits, dated November 12th, 1875; and by assignment by Prime to Meacham of two-tenths, and to Luce of one-tenth, of what was assigned by Strong to Prime, each dated November 13th, 1875. And they claim, that, if Strong and Ross were affected by any outstanding equitable rights or titles, they are not, because they are *bona fide* purchasers, without notice. This latter claim may as well be determined here, because, if valid, it may save investigation of other questions. In their answer to the cross-bill they deny "that they knew, or had heard of, or suspected any of the claims or rights of the orator, as stated by the orator in said cross-bill, in and to said letters patent or extensions thereof." In each of the

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Prime v. The Brandon Manufacturing Company.

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deeds from Prime to Meacham and to Luce, the deed from Strong to Prime is referred to as the source of Prime's title, and is described as "a certain conveyance to David W. Prime, of Brandon, Vt., in and to certain patents and royalties for 'improvements in weighing scales,' which are now in use by 'The Brandon Manufacturing Company, of Brandon, Vt.,' and are known as the Strong and Ross patents." The inventions were then, and for a long time had been, in full and open use by that company, and this reference to that use, in the very deeds to Meacham and Luce, was not only constructive notice to them of the fact of such use, but was express information of it, if they did not have that information otherwise. (*Cuyler v. Bradt*, 2 *Caines' Cas. in Er.*, 326.) And this reference in the deed of Prime to the one to him, as being of patents so in use, shows, clearly, that he took his deed with full knowledge of that use; and the conveyances were so near together in point of time, that he must have had the fact of such use in his mind at the time of both buying and selling. This use by the defendant was possession of the monopoly, as far as that use extended, at least, which is as far as this controversy, embraced in the original bill, extends; and this possession, when actually known, was constructive notice of the claim of right under which the possession and use were had, the same as the possession of land is notice to a purchaser of the legal title of any equitable right which the possessor may have. (1 *Story's Eq. Juris.*, § 400; *Pinney v. Fellows*, 15 *Vt.*, 525.) Had they inquired by what right the use of these patented inventions was had, they would probably have learned the truth about it, and must now stand as if they had enquired and learned it, which leaves them with precisely the same rights as Strong, their grantor, had, which were the same that he and Ross had.

The right to the unexpired term of the patent of 1862 stands upon different footing from those to the extensions. Strong, Ross and Howe were joint inventors of that invention, and assigned to Howe, while an agreement between them relating to the use of all these and other patented inventions,

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Prime v. The Brandon Manufacturing Company.

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dated September 1st, 1859, was in force, by the terms of which, if Howe or his representatives should elect not to continue the business of making scales, the rights of Howe, acquired by that agreement, would revert to Strong and Ross. Howe transferred the business of making scales to the Howe Scale Co. He and that company both got into bankruptcy; he has since died, and his representatives have not continued the business at all. It is argued, that this patent reverted, under the provisions of that contract. But, on the 1st of March, 1864, Stroug and Ross made another conveyance of the patents which have been extended, and several others, to Howe, without mentioning the one of May 20th, 1862, and expressly rescinding the agreement of September 1st, 1859. This left the title to this patent in Howe, with no provision in force anywhere for depriving him of it. And that it was intended to remain there is apparent from the transactions. All the other inventions of Strong and Ross relating to scales were conveyed; they would not be likely to retain this fragment out of so many, all together constituting a whole; but, there was no necessity for inserting it in the new conveyance, for he already had full title to it. They have, however, an assignment of this patent from the administrators of Howe, and insist that they are entitled to hold it under that, because the assignment from the bankruptcy Court to the assignee of Howe had not then been recorded, and the record title, at the Patent Office, appears to be in them. The bankrupt law (*Rev. Stat. U. S., sec. 5,046*) vested all patent rights at once in the assignee. His title was like that which the administrators would have acquired if the bankrupt had died without bankruptcy proceedings being in force. It accrued by operation of the law, and such titles need not be recorded. The workings of the law are not matters for record in registries of titles.

The deed from Strong and Ross to Howe, of March 1st, 1864, besides conveying the "inventions, improvements and patents," contained this further covenant: "And we, the said Strong and Ross, do hereby covenant and agree to sign all

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Prime v. The Brandon Manufacturing Company.

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necessary papers for securing extensions on any patents heretofore granted, or hereby assigned, or that may hereafter be assigned, to said Howe, and for said Howe's benefit. And we also agree to sign, whenever called upon, any papers which may be necessary to perfect the rights of said Howe under this assignment," with *habendum* to his heirs, executors, administrators and assigns. Although the statutes in force then, and under which the extensions were granted, seemed to contemplate that extensions should be granted only to inventors, for their own benefit, or to their personal representatives, there is no doubt, under the construction which has been given to them, but that, by appropriate instruments and words of conveyance, they could be conveyed wholly in advance. (*Railroad Co. v. Trimble*, 10 Wall., 367.) Nor but that an agreement for their conveyance, made beforehand, would be binding in equity. (*Hartshorn v. Day*, 19 How., 211; *Newell v. West*, 13 Blatchf. C. C. R., 114.) In *Curtis on Patents*, § 207, it is said: "It is clear, that the inchoate right to obtain an extension under a standing law, may be conveyed or controlled in advance, by the party who has the power to obtain and make it perfect; and it seems to be equally clear, that an inventor, either before or after he has obtained one patent, may so deal with the possibility of obtaining future patents on his invention, as to vest an interest in such future patents in his assignee or grantee. The question, in either case, will be, whether he has conveyed, or covenanted to convey, a future contingent interest." *Hendrie v. Sayles*, (8 Otto, 546,) is to the same effect. It may be, that, under the strict construction put upon such an instrument in respect to extensions, by the Supreme Court, in *Wilson v. Rousseau*, (4 How., 646,) this deed did not, by its own force, convey these extensions, although an intention, on the part of the grantors, to part with their whole interest in the inventions, including extensions and everything pertaining to them, is quite apparent. It is urged, however, that it is not even a covenant to convey, but is merely a covenant to procure extensions for themselves, if Howe should desire to have them,

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Prime v. The Brandon Manufacturing Company.

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and have the use of the patents by paying for it as they should agree, rather than to have the inventions left to the public at the expiration of the original terms. They covenanted distinctly to sign all papers necessary for procuring extensions. Had they stopped there, it might be argued, in view of the strict construction before mentioned, that they were to do this for the benefit of themselves, to whom alone extensions could be granted, although then the argument would be somewhat strained. But, they went further, and added, "for said Howe's benefit." This could mean only one thing, and that was, that Howe should have the extensions. After making this covenant they could not, with any show of justice, claim the benefit of any papers executed to procure extensions of these patents, to the exclusion of Howe or of his assignees. It was like a covenant to stand seized, and, in equity certainly, equivalent to a grant of the extensions, as such a covenant relating to land would be, and at law even, under the state of uses. (*Milburn v. Salkeld, Willes R.*, 673.) The Patent Office understood it as a grant, and, when the application for the extension first applied for was made, regarded the effect of it as standing in the way of the rule requiring inventors to be the owners of extensions, if granted.

As, in equity, they parted with their rights to the extensions, they are not, in this suit in equity, entitled to any relief for an infringement of those rights, without showing, in some way, that those rights have been restored, so as to be infringed in their hands, or that they stand upon the rights of those owning them. They are claimed to have been restored in several ways. One is by the assignment to Strong of a note given by Howe to Ross and indorsed by him, for his share of the price of the patents, and secured by a lien upon them, with its securities. There are plain reasons why this claim is groundless. One of these is, that the lien never covered the extensions at all. Another is, that the note was proved as an unsecured claim, against the estate of Howe in bankruptcy, by the endorsee, of whom Strong obtained the assignment, and was discharged as such, which would have

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Prime v. The Brandon Manufacturing Company.

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left the security, if there had been any, the property of the estate.

They also claim, that Strong was restored to, or acquired some rights by, an assignment of the extensions from two of three administrators of Howe. On the 17th of April, 1868, Howe conveyed the patents assigned to him by Strong and Ross to the Howe Scale Co., by deed, and in that deed was this recital : "And whereas I, on the 29th day of June, A. D. 1864, did sell, and agree to assign and convey, to the Howe Scale Company, (a corporation duly organized under the laws of the State of Vermont,) all of the aforesaid inventions and letters patent. And, whereas, I also agreed to assign and convey any further patents pertaining to scales or weighing apparatus; which might be granted to the said Strong and Ross and conveyed to me." The extensions had not then been granted, and no other mention was made of anything that would cover them, in that instrument. But, the words, "further patents," would cover them; and this recital was of an agreement on his part to convey them to the Howe Scale Co., the grantee in, and other party to, the deed. And this recital by Howe of an agreement by him to convey them, while he would otherwise hold the equitable title to them, is direct evidence against those claiming under him or his administrators since then, as an admission against his title and interest, that his title and right were subject to that agreement, which the recital is also evidence that he made, and from which it is found as a fact that he did make it. (*Downs v. Belden*, 46 *Vt.*, 674; *Wing v. Hall*, 47 *Vt.*, 182; *Wheeler v. Wheeler*, 47 *Vt.*, 637.) This instrument was well known to Strong as well as to the administrators, because it is expressly referred to by date and place of record, in their deed to him, and they must have known of this agreement of Howe with the Howe Scale Co. They are certainly affected with presumptive notice of it. (*Newland on Contracts in Eq.*, 511.) The conveyance to Strong was made subject to the interest conveyed by Howe to the Howe Scale Co. "in letters patent as enumerated and conveyed" by that

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Prime v. The Brandon Manufacturing Company.

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instrument, which would come very near to this equitable right, although strictly not including it. So, the Howe Scale Co. had acquired the equitable right to the extensions, and Strong, if he purchased anything, took it subject to that right. But, there was nothing left in the administrators, or to them, of any right to the patents. The provisions of the bankrupt law not only vested the title to patent rights which the bankrupt had, in the assignee, but all rights in equity, and choses in action, which would cover the whole. (*Rev. Stat. U. S., sec. 5,046.*) It is insisted, that, as the assignee of Howe in bankruptcy did not claim the extensions, the statute of limitations to two years, of actions against and by him, would cut off all his rights. This may be true. But that limitation commences to run only from the time when the cause of action accrues. (*Rev. Stat. U. S., sec. 5,057.*) Soon after his rights as assignee accrued, the defendant began to use these inventions, under a conveyance from him as assignee of the Howe Scale Co. Neither the administrators of Howe, or Strong and Ross, or either of them, were using them or claiming them, or doing anything by which any cause of action accrued to him, and there was no cause of action to be barred in their favor. The defendant was using the inventions when the extensions were severally granted, and has continued the use ever since, and more than two years elapsed after the granting the last one, before the commencement of this suit. It is said further, that, as Howe had only an equitable right, and the legal title was somewhere else, and the equitable right only passed to the assignee, he should have brought a proceeding in equity, to enforce the equitable right, and that, not having done so for the space of two years, the equitable right is barred and the whole interest left where the legal title is. But, the right of Howe was to have the necessary papers executed by Strong and Ross for procuring the extensions, for his benefit. Before the time arrived within which by law applications for extensions could be made, or for any of them, and on the 6th of May, 1869, the assignee of the Howe Scale Co. conveyed to Nathan T.

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Prime v. The Brandon Manufacturing Company.

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Sprague, Jr., all its property, including many patents, among them these which have been extended, and also "all of the interest or right the said Howe Scale Co. has in and to any and all other patents, by virtue of any or all assignments heretofore made to the said Scale Co., whenever or by whomsoever made." This was broad enough to carry the equitable rights which that company had to these extensions. And, in the same language, Sprague made a like conveyance of the whole to the defendant, on the 9th of June, 1869. So, when the extensions were granted, the assignee, either as of Howe or of that company, had not any equitable right to enforce. The whole right in that behalf was in the defendant, who had no occasion then to enforce it, nor even until about the time of bringing this suit, for, until that time, all yielded to such right without question.

The statutes under which the extensions were granted authorized the granting them, if it should appear, "having due regard to the public interest therein, that it is just and proper that the term of the patent should be extended, by reason of the patentee, without neglect or fault on his part, having failed to obtain, from the use and sale of his invention, a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same, and the introduction thereof into use." (*Act of July 4th, 1836, § 18, 5 U. S. Stat. at Large, 124.*) This language would seem to contemplate that the extension should be to the inventor directly, or so that he would receive the benefit of it, if granted, to make up to him the *reasonable remuneration* which *he* had failed to obtain. The course of the Patent Office was in accordance with this idea, and it required that it should be made to appear that the inventors would own some substantial interest in the extensions, so that they would be benefited thereby, before they would be granted. This became known to all concerned in procuring these extensions. While the application for the extension of the patent of January 15th, 1856, was pending, all the conveyances and assignments mentioned had been recorded, except that from Sprague to the defendant. The

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Prime v. The Brandon Manufacturing Company.

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Office construed them as showing that Strong and Ross, the inventors, would not own, nor take any benefit from, the extension, and, under the practice, this stood in the way of granting the extension. To obviate this difficulty, Sprague, acting for and in the interest of the defendant, made an assignment of all his right to that patent and invention in the States of New Hampshire and Connecticut, to Strong and Ross, which did not answer the purpose. Then Howe, who was employed by the defendant to, among other things, assist in procuring the extension, acting in the interest of the defendant, and not knowing of the record of the other conveyances, made an assignment to Strong and Ross of all his interest in and right to the extended term of that patent by virtue of the conveyance of March 1st, 1864. This also failed of satisfying the Patent Office, and, on the 15th of November, 1870, Sprague, acting as before, made a full assignment of the extended term to Strong and Ross, whereupon it was granted. The conveyance from Sprague to the defendant was recorded before the applications for the other extensions were made, and, in advance of each, the defendant assigned the extended term to Strong and Ross, for the purpose, as before, of making it appear that they would own the extensions, if granted, and thereupon they were granted. All the proceedings in respect to procuring the extensions were had for and at the expense of the defendant, and Strong and Ross executed all the papers which they executed at the request of the defendant, in pursuance of the covenants and agreements in their conveyance to Howe, of March 1st, 1864. This was done upon the full understanding, on the part of both Strong and Ross and the defendant, that the rights of Howe under that agreement had passed to the defendant; that Strong and Ross were in duty bound to execute the papers for the benefit of the defendant; that the assignments to them were merely for the purpose of making it appear that they would own the extensions; and that the extensions would really and in fact belong to the defendant by virtue of the rights which had before been, or supposed

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Prime v. The Brandon Manufacturing Company.

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to have been, acquired. Ross suggested an assignment from himself and Strong, according to the understanding, but none was made. The business relating to procuring the extensions was transacted mainly through written correspondence, and the purposes, intentions and understandings of the parties, as found and stated, fully appear from it.

It is claimed, that these conveyances, notwithstanding the circumstances under which they were made, restored the title and right to the extensions to Strong and Ross, or estopped the defendant from denying the right of Strong and Ross to them. The apparent legal title to the extensions came to Strong and Ross; but the legal title to a patent may be in one person, and the equitable right to it in another; and this applies to extensions as well as to original patents, as fully appears from the principles and authorities before referred to. (*Hartshorn v. Day*, 19 *How.*, 211; *Newell v. West*, 13 *Blatchf. C. C. R.*, 114.) No consideration whatever was paid by Strong and Ross for the reassignments of the extensions; on the understanding stated, they were not to have them, but were to have merely the color of legal title to them, for the purpose which has passed. There are no just grounds for any estoppel in their favor, or in favor of the plaintiffs. They were not deceived into doing anything which they otherwise would not have done, by the conveyances, or the representations that the extensions would be for their benefit. The misrepresentation was to the Patent Office, not to them. They fully understood the whole, and participated in it. As between them and the defendant, the estoppel, if any should be allowed to operate, would work the other way. These inventions were the foundation of the defendant's business, and large outlays were made in establishing it, on the expectation of having them; and it is not probable that the defendant would have permitted them to be granted without opposition, for Strong and Ross to have them, and much less, that the expenses of obtaining them would have been paid, to secure them to Strong and Ross. They cannot, in good faith, now claim the extensions, and, in equity, their claim cannot prop-

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Prime v. The Brandon Manufacturing Company.

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erly be enforced. Ross, in fact, never has claimed them, but has merely quitclaimed his rights, if any, to Strong.

These assignments were, however, made to deceive the Patent Office, and the parties, and their rights to relief in respect to the assignments, are to be considered as they are affected by that circumstance. The grant of these monopolies, like that of all other patents, was from the sovereign power of the General Government, under the Constitution. The Patent Office is the instrument of the Government, in making the grants, under the law. The extensions would be detrimental to the public, to precisely the same extent that they would be beneficial to the grantees. The assignments, "by a feigned countenance and show of words and sentences, as though the same were made *bona fide*," in the language of the statute, 27 *Eliz.*, *ch.* 4, induce the Patent Office to grant the extensions, when it would not have done so, if the real purpose of making the assignments had been known; and now it is claimed by the orators, that the assignments so made shall be held operative, and the defendant not allowed to set up the arrangement under which they were made, in defence, and by the defendant, that the title created by them, if any, shall be held in trust for the defendant, and that the trust be executed by decree in the cross cause. The statutes, 13 *Eliz.*, *ch.* 5, and 27 *Eliz.*, *ch.* 4, made all conveyances within their purview void as to all those sought to be defrauded, and left them, or made them, binding between the parties to them. Those statutes are not a part of the laws of the United States relating to patents; and, if the laws of the State would control, in any degree, these conveyances would not come within the provisions of those statutes, as adopted in Vermont. (*Gen. Stat. Vt.*, 672, *sect.* 32.) So, these conveyances must stand as at the common law. They were wholly without any consideration, and have never been executed by any delivery of possession. The defendant has all the while had the inventions in use, and the letters patent themselves, with the endorsement of extension thereon. The conveyances within the statutes cited, and those within 7 & 8

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Prime v. The Brandon Manufacturing Company.

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*Will. 3, ch. 25*, and *10 Anne, ch. 23*, making conveyances for the purpose of conferring a right to vote void, only as between the parties thereto, have generally been held to be valid between the parties to them only by force of the express provisions of the statutes to that effect. (*Twyne's Case*, 3 *Rep.*, 80, *b.* ; *Phillpots v. Phillpots*, 1 *E. L. & E.*, 339 ; *Dyer v. Homer*, 22 *Pick.*, 253.) And they would seem to have been void at the common law, at least so far as that they would not, as conveyances, afford sufficient foundation for a cause of action resting upon themselves alone. (*Alexander v. Newman*, 2 *Com. B.*, 122, and 15 *Law J. Rep.*, *N. S.*, part 2, *C. P.*, 134.) The orators here have not any claim under these conveyances, except what lies wholly in action. They are not defending any possession taken under the conveyances, but are asking relief wholly, as to this part of the case, upon the strength of them. Unless they are held valid and operative, as conveyances, as those under the statutes mentioned were held, the orators have no case. The orator in the cross-bill cannot have the relief sought there, without having the conveyances held operative, and the title under them decreed to be a trust merely, and the trust decreed to be executed. It has been suggested, on the part of the defendant in the original bill and orator in the cross-bill, that all were equally in the wrong as to the purpose of these conveyances, and that, if they should be held inoperative, on account of this purpose, the title to the extensions would be left in the defendant. This might be true, if the extensions would have been in existence, with a title to them resting somewhere, without these conveyances having been made at all. But, the extensions were not in existence when the conveyances were made, and no one had any vested right to have them granted. They were not like original patents, or reissues, in that respect, but were grantable only in the discretion of the Commissioner. Without these conveyances the extensions would not have been granted at all. Neither party can be aided here, without aiding the purpose for which the conveyances were made. The doctrine is universal, as it is salutary, that the Courts of a country will

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Prime v. The Brandon Manufacturing Company.

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not aid parties in what is prejudicial to the State. (*Collins v. Blantern*, 2 Wils., 341; *Law v. Law*, 3 P. Wms., 391; *Hanington v. Du Châtel*, 1 Bro. Ch., 124; *Parsons v. Thompson*, 1 H. Black., 322; *Pingry v. Washburn*, 1 Aik., 264; *Fuller v. Dame*, 18 Pick., 472; *Powers v. Skinner*, 34 Vt., 274; *Marshall v. Balt. & O. R. R. Co.*, 16 How., 314.) This case seems to fall within that principle, as to these conveyances, and, as neither party has title except through or in consequence of them, this Court will leave the parties, in those respects, where it finds them.

The original term of one of the patents, and the right to apply for an extension under the general law, expired before any application for an extension was made, and a special Act of Congress was passed, approved July 15th, 1870, (16 U. S. Stat. at Large, 657,) granting leave to Strong and Ross to make application to the Commissioner of Patents for an extension, and authorizing him to consider and determine it in the same manner as if it had been made in due season. It is claimed by the orators, that the right to that extension accrued under this special grant, and that Strong and Ross thereby acquired an express title to it, which they have never parted with but to the orators. There is no question but that a grant of a patent, or of an extension of a patent, by Congress, as a bounty, would enure to the benefit of the grantees only, and that no right to it could be acquired, except by express conveyance from them. (*Wilson v. Rousseau*, 4 How., 646.) But this was not such a case. Congress merely removed a limitation, and left the Commissioner to grant or refuse the application, precisely as he would under the general law. It was not a special grant, but the general law was made to cover the case. And the passage of this Act was procured by the defendant as a part of the proceedings to obtain the extensions, in the same interest, and for the same purpose, and upon the same understanding. The position of the parties in respect to it is the same as in respect to the others.

These considerations fully dispose of the claim of the orator in the cross-bill for relief against setting up a false

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Prime v. The Brandon Manufacturing Company.

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title, or falsely asserting that this orator has no title, to customers, causing damage, for, they show a want of foundation for maintaining such a claim, even if this Court would have jurisdiction for such a cause of action, between these parties, who are citizens of the same State. But, such a claim would involve no Federal question, of which this Court could take jurisdiction between such parties. (*Hartell v. Tilghman*, 9 *Otto*, 547.)

The bill alleges, that the extension passed from Strong and Ross to Howe, by the conveyances stated. The orators, at the hearing, asked leave, by motion, to withdraw those allegations, so as not to be bound by them. The decision upon this motion was reserved. In the view taken of the effect of the conveyances, the amendment would be of no importance. If there should be an appeal, it might become of importance, and its allowance here be of importance. The allegation is one of construction rather than of a fact, and, perhaps, the orators ought not to be bound by it, if it should become material, further than the fact that it was made might show the understanding of those making it. That fact would remain, if the technical effect of it, as a pleading, should be obviated by the amendment, if the record should be left so as to show the whole. Therefore, the motion is granted, to the extent of allowing an amendment striking out those allegations to be filed separately, without obliterating them as they stand in the original bill.

The costs upon the original and cross-bills are probably so nearly equal, that none are allowed either way.

Let a decree be entered dismissing the bill and cross-bill.

*W. G. Veazey* and *J. N. Edminster*, for the plaintiffs in the original suit and the defendants in the cross suit.

*Prout & Walker*, for the plaintiffs in the cross suit and the defendants in the original suit.

## ADDISON C. FLETCHER vs. JOSEPH SELDEN. IN EQUITY.

The letters patent granted to Addison C. Fletcher, June 8th, 1869, for an improved Government revenue stamp, are valid.

The claim of said patent, namely, "A postage or revenue stamp, having a portion of its surface composed of thin or fragile paper, or other suitable material, loosely attached, and on which a portion of the design or other matter is printed, substantially as and for the purpose or purposes set forth," is limited to a stamp on which the flap is loosely attached to the face of the main body of the stamp, and has a portion of the design imprinted upon it, and is not infringed by a stamp wherein the design is printed on the main body of the stamp, and a portion of the printed stamp is loosely attached to an unprinted slip of paper attached to the back of the main body.

(Before SHIPMAN, J., Connecticut, July 9th, 1879.)

SHIPMAN, J. This is a bill in equity which is based upon the alleged infringement of letters patent which were issued to the plaintiff on June 8th, 1869, for an improved Government revenue stamp. The defendant is a collector of internal revenue in the State of Connecticut, and, as such collector, under the authority and by direction of the Commissioner of Internal Revenue, sold and used, prior to the date of the bill, the tax-paid spirits stamps, the rectified spirits stamps and the wholesale liquor dealers' stamps which the Commissioner has directed shall be used. The three classes of stamps are made in the same way. The plaintiff's invention is described in the specification of his patent, as follows: "My invention consists in providing the stamp with a flap or flaps covering a portion of its face, and arranging the vignette, design, or printed matter on said stamp to extend over the flap or flaps and remaining or uncovered portion of said face or body of the stamp. By this application of my invention, as applied to an adhesive stamp, whether for internal revenue or other purposes, said stamp may be cancelled by tearing off the flap or flaps, which, if necessary, may be preserved as evidence of the cancellation; or, where not required

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Fletcher v. Selden.

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to be preserved, the flap or flaps may either be torn off and thrown away, or be so mutilated by the act of cancelling, as heretofore practised on postage stamps, (which, and other adhesive stamps, my invention is equally applicable to,) as that it will be impossible to use the same stamp over again without detection of the fraud. Referring to the drawing, *a* is the main body of an internal revenue stamp, of the paper ordinarily used, having mucilage or other adhesive matter on its back, and having secured to its face, for a portion of its length or area, an outer piece of tissue or other thin paper or flap, *b*, which is loose from the main body, excepting where joined to it, as at *c*, and which has impressed on it a continuation of the vignette or design, that is seen, in part, on the remainder, or uncovered portion of the main body. A stamp thus constructed may be cancelled by simply tearing off the flap, *b*, which may be separately preserved as evidence of the cancellation, or, in case of a postage stamp, for instance, it may be so mutilated by the ordinary method of cancellation, as to make the use of the stamp again, without detection of the fraud, impossible. The flap, *b*, being made of thin or bibulous paper, the portion of the design upon it is protected from being effaced by chemical agents, in consequence of the fragile or peculiar nature of such paper, while the body, *a*, may be made of comparatively stout paper, or, especially, where it is desired to preserve separate evidence of the cancellation, the flap, *b*, which is the portion torn off in cancelling, may be made of stout paper, and the main body, *a*, of thin or bibulous paper. In fig. 2 of the drawing, the same principle of construction is shown, but the body, *a*, represented as having duplicate flaps, *b*, *b*, on the face of the stamp, which, in some cases, may be preferred to one." The claim is as follows: "A postage or revenue stamp, having a portion of its surface composed of thin or fragile paper, or other suitable material, loosely attached, and on which a portion of the design or other matter is printed, substantially as and for the purpose or purposes set forth."

The stamps which are used by the defendant are made in

the following manner: The body of the stamp is composed of a piece of paper of one thickness, upon which is impressed the printed matter of the stamp. A slip of red blank paper is attached to the outside edges of the back of the body of the stamp. This slip is about one third of the length of the body of the stamp, and is of the same width. When the stamp is to be used, it is placed upon that part of the head of a barrel which has been previously covered with paste, is secured to the barrel by tacks, is varnished, is cancelled by a stencil plate, and, in certain cases, which it is not necessary to specify, the portion over the red slip and which is not attached to the barrel in consequence of the intervention of the slip, is cut out and is preserved. The blank slip adheres to the pasted surface of the barrel.

The questions in regard to the patentability and novelty of the plaintiff's invention are found in his favor. The question of infringement is the important one in the case, and depends mainly upon the extent of the plaintiff's invention, as described and claimed in his patent. The learned expert for the plaintiff understands the gist of the invention to consist in a revenue stamp having the characteristics, that one of its sides is adapted to be pasted to an article, and the other side is printed over its entire substance substantially, and that a certain portion of the printed face is so loosely attached to the portion which is to be pasted, that the loose portion may be torn or cut away, and leave over the area torn or cut away a layer of paper pasted to the stamped article. As thus understood, it is immaterial whether the flap is attached to the back or to the face of the main portion of the stamp, or whether the flap is a printed or a blank piece of paper.

Without controverting the position that this was the gist of the invention, I am of opinion that such was not the extent of the invention as described and claimed in the patent. An examination of the specification will show, I think, that the grant which the plaintiff received was much less broad than the invention is now claimed to have been, and that the patent cannot, even with the aid of the principle of liberal inter-

pretation, properly include a stamp of two thicknesses of paper, one piece printed and the other unprinted, it being only necessary that the unprinted piece should be attached to the stamped article, and that the printed part should be loosely attached to the unprinted piece. In the specification the patentee says that his invention consists in providing the stamp with a flap or flaps, which are clearly described. The flap, upon which is impressed or printed a part of the vignette, design or printed matter, is loosely attached to the face of the main body of the stamp, upon the back of which is the mucilage or adhesive matter, and the flap, thus loosely attached, covers a portion of the face of the body of the stamp. Two particulars are indispensable, if the descriptive part of the specification clearly describes the invention. The flap must have a portion of the design imprinted upon it, and it must, also, be loosely attached to the face of the main body of the stamp. The claim, also, in substance, specifies the same particulars. It is for a stamp having a portion of its surface composed of some suitable material, on which portion a part of the design or other matter is printed, and which portion is "loosely attached." Loosely attached to what? The plaintiff construes these words to mean that the printed portion is loosely attached to any other portion of the stamp, and if, therefore, it is loosely attached to a flap, or to any unprinted portion of the stamp which adheres to the stamped article, such loose attachment satisfies the claim. But, in the descriptive part of the specification, the loosely attached portion, which is the flap, has the two characteristics which have been mentioned, one of which is that the portion is loosely attached to the face of the main body of the stamp. The words "loosely attached" must, then, mean, loosely attached to the face of the body of the stamp.

In the defendant's stamp, the design is printed upon the main body of the stamp, and a portion of the printed stamp is loosely attached to an unprinted slip of paper upon the back of the main body. The flap of the defendant's stamp is unprinted and is attached to the back of the main body of the

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The Julia Blake.

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stamp. The whiskey stamps are an entirely different article from the plaintiff's stamp, as described, and can be included within the patent only by giving to the words "loosely attached" a meaning which they obviously did not have in the mind of the inventor when the claim was drawn. The whiskey stamp is a modification of the inventor's idea, which had not occurred to him when he drew his specification, which was so limited in its terms as not to include the stamps of the defendant.

The bill is dismissed.

*Treadwell Cleveland*, for the plaintiff.

*Calvin G. Child*, for the defendant.

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THE JULIA BLAKE.

The master of a vessel cannot hypothecate his cargo, by bottomry, without communicating with the owner of the cargo, if communication with such owner be practicable, and such communication must state not merely the necessity for expenditure, but, also, the necessity for hypothecation.

A vessel, with cargo, bound from Rio de Janeiro to New York, put into St. Thomas in distress. The master, to raise money to repair the vessel, gave a bottomry bond on vessel, freight and cargo. He had notice that C., at Philadelphia, was the consignee of the cargo. He made no communication to him, and no sufficient communication to the shipper of the cargo. He could have communicated with both of them by telegraph: *Held*, that the bond was void, as respected the cargo, for want of authority in the master to give it.

(Before BLATCHFORD, J., Southern District of New York, July 16th, 1879.)

THIS was a libel *in rem*, in Admiralty, filed in the District Court, against a vessel and her freight and cargo, on a bottomry bond. That Court sustained the libel as to the vessel and freight, but dismissed it as to the cargo and the proceeds of certain copper and junk, with costs to the claim-

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The Julia Blake.

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ants of the cargo. The libellant appealed to this Court from so much of the decree as was not in his favor. This Court found the following facts: "The brigantine Julia Blake, Abraham Knowlton, master, left the port of Rio de Janeiro on or about the 31st of March, 1876, bound for the port of New York, having on board a cargo consisting of 582 logs of rosewood. The bills of lading were three in number, and were drawn to the order of the shipper, James Philip Mee, of Rio de Janeiro, for 253, 139 and 190 logs respectively. Of this quantity about 200 logs belonged to the shipper, Mee, but the claimants had made advances on them to Mee. The remainder belonged to the claimants herein. The charter party was dated March 16th, 1876. Said Mee was named therein as the charterer, and the freight stipulated was the gross sum of £220 sterling, £110 of which sum was paid in advance. The master of the brigantine, on sailing, received from said Mee a letter of instructions, directing him to proceed to the port of New York and there consign his vessel and cargo to Winthrop Cunningham & Sons, Philadelphia, the claimants of the cargo herein, or their agents, and, if compelled by stress of weather, or other accident, to put into port, to consign the brigantine to persons named, at various ports, and, among them, to Lamb & Co., at St. Thomas. The said brigantine was a British vessel, and was owned by Peter Blake, of Parsboro', Nova Scotia. Said brigantine proceeded safely on her voyage until the 3d or 4th of May, 1876, on one of which days her rigging parted and her masts fell, the main-mast breaking at the saddle, about six feet from the deck, and the fore-mast at the head. The fallen spars and wreck remained for sometime alongside and thumping, before they could be cleared away. This accident made it imprudent to prosecute the voyage, and the master properly made for St. Thomas, as a port of distress. Said brigantine reached St. Thomas on the 27th of May, 1876. The master applied to the acting British consul, and said consul appointed a survey, consisting of three persons, the harbor master, the principal shipwright in St. Thomas, and the master of a vessel in port.

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The Julia Blake.

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Said surveyors made a report on the 30th of May, 1876, of which a copy is in evidence. The pumps were carefully and fairly sounded upon such survey. The metal of the vessel below the water was not visible, except in places, and there it was more or less bruised and torn off. Said survey properly recommended a discharge of the cargo, and it was necessary to strip the vessel of her copper in order to stop the leaks. In consequence of said report, the cargo was discharged, and, on the 8th of June, 1876, a second survey was ordered by the consul. upon application of the master. The surveyors were the same as before, with the exception of the surveyor described as a shipmaster in port, who was replaced by another shipmaster in port. A copy of the report of said second survey is in evidence. The said brigantine made as much water at the time of the second survey as she did at the time of the first, namely, twelve inches per hour. The surveyors examined the copper of the brigantine upon the second survey, as far as it was visible, and the statement in said survey, that the metal had been 'much broken and torn away and ragged,' was fully warranted by the facts. When the master arrived at St. Thomas, he went to several mercantile houses in St. Thomas, and seemed to be seeking a proper party to whom to consign said vessel, and finally went to Lamb & Co. and engaged them to attend to the business of the ship and the repairs. He did not show them his charter party and letter of instructions, but told them he had lost the same. Thereupon, the following correspondence passed between the parties in interest: (1.) Telegram from Knowlton to Peter Blake, Parsboro', Nova Scotia. 'Julia Blake, Saint Thomas, dismasted, leaky, consigned Lamb; sending survey mail 29 | 5 | '76.' (2.) Copy of letter from Captain Abram Knowlton to Peter Blake, Esq., pressed in copy book of Lamb & Co. 'S. S. Beta, via Halifax. Saint Thomas, 27th May, 1876. Peter Blake, Esq., Parsboro', Nova Scotia. Dear Sir: I regret to have to report that the brigantine Julia Blake, on her voyage from Rio de Janeiro, encountered heavy weather on the 4th inst., and, for the safety of lives,

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The Julia Blake.

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vessel and cargo, I was compelled to cut away masts to right the vessel, and to put into this port, as we were in a too disabled condition to go north. A survey will be held on Monday, and I will supplement this letter by a telegram acquainting you what the surveyors recommend to be done in her present leaky and damaged state. It will likely be necessary to discharge, to ascertain damages, and for new masts, &c. This mail closes at once, so I must defer giving you full particulars until next steamer. I remain, sir, your obedient servant, Abram Knowlton.' (3.) 'French Frigate Minerve, via Philadelphia. St. Thomas, 13 June, 1876. Peter Blake, Esq., Parsboro', Nova Scotia. Sir: We have to confirm Captain Knowlton's letter to you, dated 27th ult., acquainting you that the dismasted brigantine Julia Blake had put in here in a leaky and disabled condition. By surveyors' recommendation, the vessel has been discharged, and is to-day on the marine repairing slip, for shipping and caulking, &c.; masts, sails, &c., are being made, and in the course of another month the Julia Blake will probably be ready for sea in a seaworthy state. Captain Knowlton despatched you a telegram, thus: 'Julia Blake, Saint Thomas, dismasted, leaky, consigned Lamb; sending survey mail,' on the 29th ult., which, no doubt, reached you promptly and correctly. From his not receiving any reply from you, he concluded that you wish him to follow the customary routine with documents, &c. Meantime we hand, herein, certified copy of extended protest from the British Consulate, which may interest you. No doubt your letters will state in what manner accounts here are to be paid. We remain, sir, yours faithfully, Lamb & Co.' (4.) 'Alpha, via Halifax. St. Thomas, 22nd June, 1876. Peter Blake, Esq., Parsboro', Nova Scotia. Sir: We last wrote you on the 13th instant, via Philadelphia, with certified copy of extended protest *per* Julia Blake, which we trust has reached you safely. The S. S. Alpha arrived here to-day from Halifax, without bringing us any letter from you, but Captain Knowlton tells us that he had a communication, and we, therefore, refer you to him, or his ad-

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The Julia Blake.

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vices, for particulars, in connection with the repairing and refitting of the brigantine Julia Blake. We suppose that your next will furnish instructions regarding funds for expenses here. If you don't provide the needful, same will likely be raised by bottomry and respondentia loan, payable on arrival at New York. The Julia Blake should be ready for sea about 15th proximo; and we remain, sir, your obedient servants, Lamb & Co.' (5.) 'St. Thomas, 20 July, 1876. Peter Blake, Esq., Parsboro', N. S. Dear Sir: We have to acknowledge the receipt of your valued favor of 4th instant, the contents of which claim our best attention. The Julia Blake is progressing with her repairs, and will soon be ready to take in cargo. We cannot, at present, give you any precise estimate of the expenses, as a good deal remains to be done yet, but Captain Knowlton is putting the vessel in first rate order, having at the same time regard to every practicable economy. The case being one of 'general average,' the cargo will, of course, contribute its proper proportion towards expenses, and we think the documents which Captain Knowlton will take with him will render the adjustment speedy and satisfactory to all the interests and parties concerned. We are, dear sir, yours faithfully, Lamb & Co.' (6.) Copy of letter addressed to the shipper of cargo ex Julia Blake, at Rio. 'Star Ball Steamer, from Porto Rico. St. Thomas, 1st June, 1876. Rio Janeiro: Dear Sir: We have to advise that the brigantine Julia Blake put in here on the 27th ult., dismasted and leaking. A survey has been held, and, for effecting repairs, &c., the cargo is being discharged. Captain Knowlton tells us that he has cabled the casualty to the United States. As the cargo is consigned 'to order,' we have been unable to acquaint the New York consignees of the misfortune. We remain, yours faithfully, Lamb & Co.' (7.) Copy of letter addressed to the shipper of cargo ex Julia Blake, at Rio. 'Per S. S. Nile, via Southampton. St. Thomas, 28th September, 1876. Rio de Janeiro: Dear Sir: Your favor of the 13th July last reached us recently via Porto Rico, and only after the Julia Blake had sailed from

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The Julia Blake.

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this port. The letter of instructions which you mention having given to Captain Knowlton, on sailing from Rio, has never been laid before us, nor did he produce the charter party, although we repeatedly asked for it. He alleged that it had been mislaid or lost at the time of the disaster at sea, and, on being questioned, denied having any instructions from you as to the consignment of vessel in case of average. The bills of lading being 'to order,' left us no clue as to the consignees of cargo. The casualty was, however, at once cabled to the New York Board of Underwriters. While we regret that you should have felt any doubt as to our compliance with your wishes, it will now be clear to you how blameless we are in the matter. Whether Captain Knowlton purposely withheld information from us, or if he actually did lose the documents referred to, remains, at present, open for conjecture only, but the control intended to have been placed with us remained, in part, at least, in the hands of the captain, as master of the vessel. We would suggest that you advise us by mail of the despatch of all vessels conveying instructions from you to our firm. In the event of their putting into this port in distress, we would then, if necessary, be able at once to take up a position with the master, and the protection of your interests, at our hands, can then not be disputed or ignored. The adoption of such a course on your part is, we think, more advisable under present circumstantial means of mail communication between Rio and St. Thomas. We are, dear sir, yours, very truly, Lamb & Co.' During all the time that said brigantine was at St. Thomas, there was facility for telegraphic communication between St. Thomas and New York. There was telegraphic communication between St. Thomas and Rio de Janeiro, by way of New York, London, Lisbon and Pernambuco, from the time said brigantine arrived at St. Thomas till the 21st of July, 1876. On the last mentioned date a break occurred in the cable between Bahia and Rio de Janeiro, but the Western Union Telegraph Company continued to transmit telegrams from New York to Bahia, and they were forwarded thence to Rio de Janeiro, the time

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The Julia Blake.

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required for transmission from New York to Rio de Janeiro being about five days. The lines of telegraph aforesaid were often employed by merchants and men of business in St. Thomas, and that from St. Thomas to New York was known to and used by the claimants. Immediately after the second survey the repairs on the ship commenced. The bills for the repairs and supplies to the vessel were paid by Lamb & Co., after being first certified as correct by the master. Some were paid to the master and some to the parties making the repairs and furnishing the supplies. On the 22d of July, 1876, the repairs were completed and the master advertised for proposals for a loan on bottomry and respondentia of the ship, freight and cargo, to the amount of \$7,500 or thereabouts. The notice was extensively advertised and the libellant alone made a proposal. This was to loan the amount at a maritime interest of 14 *per cent.* The offer was accepted. Copies of the advertisement and tender are in evidence. Lamb & Co. made no inquiry as to the necessity of the repairs and supplies, but relied on the statement of the master. The discharging of the cargo was necessary in order to stop the leaks and so make the vessel seaworthy for a voyage to New York. The remetalling of the vessel was necessary to make her seaworthy for a voyage to New York. The repairs and supplies furnished were necessary to make the vessel seaworthy for a voyage to New York. The only inquiry made by the libellant was as to the sufficiency of the security in amount to satisfy the loan, and as to the regularity of the execution and attestation of the bottomry bond. When the matter came to be closed, the captain informed Lamb & Co. that a large amount of expenses had been incurred of which they had no previous information, and that the amount required to defray the expenses and their commissions and charges was \$11,600. The libellant paid over the money, \$11,600, on the captain's order, to Lamb & Co., and received the bond. The vessel left St. Thomas on August 5th, 1876. On her arrival in New York, payment of the bond above mentioned was demanded and refused, and the libellant li-

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The Julia Blake.

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belled ship, freight and cargo. The ship was attached and sold by the marshal for about \$4,500, and the proceeds remaining after paying off the crew and defraying cost of sale were paid into Court. There was stored in the said vessel, at the time of the sale, a quantity of scrap copper and junk, consisting of old sails and ropes. The copper and junk were not sold with the vessel, but were afterwards sold and the proceeds were paid into Court. The copper and junk were no part of the vessel or of her tackle, apparel and furniture. The value of the cargo in New York was about \$18,000. The cargo was not perishable and would not have been injured by being stored under cover at St. Thomas for three or four months. St. Thomas is a central port where vessels go seeking business, and to which parties requiring vessels also go. Vessels for the shipment of merchandise are always available there. The rosewood aforesaid could have been forwarded from St. Thomas by vessels other than the Julia Blake, at an expense of from \$1,000 to \$1,500. It was for the interest of the owner of the said rosewood that it should be so forwarded, rather than that it should be hypothecated to pay for repairs to the Julia Blake. The libellant had the means of ascertaining the facts mentioned in the last four preceding sentences, before he made the loan in question."

The decision of the District Court, (CHOATE, J.,) was as follows, so far as regarded the cargo: "The master, on his arrival at St. Thomas, instead of consigning his ship, as instructed, to Lamb & Co., went to several mercantile houses in the place and made inquiries, as if seeking a proper party to consign her to, and finally went to Lamb & Co., and engaged them to attend to the business of the ship and the repairs, which were made in accordance with the surveys, were made under their supervision, as agents of the vessel. The master told Lamb & Co. that he had lost his charter party and letter of instructions. There is no other evidence that he had lost them, but he failed to produce them to Lamb & Co. The master was not called as a witness, nor is his non-production accounted for, and from the testimony I feel

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The Julia Blake.

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called upon to look upon any statement made by him as very questionable. Even if he had lost his charter party and his letter of instructions, it is hardly credible that he should have forgotten to whom he was consigned at New York, and the fact that at St. Thomas he was consigned to Lamb & Co., yet he communicated neither of these facts to Lamb & Co., producing only to them the bills of lading which made the cargo deliverable to the order of the shipper, and gave no other clue to the consignee in the United States. Immediately on arrival at St. Thomas, the master wrote to Peter Blake, the owner of the vessel, at Parsboro', and subsequently Lamb & Co. and Blake corresponded on the subject of the disaster and the repairs; and this correspondence shows that the owner of the ship consented to the raising of funds by bottomry. On the 1st of June, Lamb & Co. wrote a letter addressed to 'The shipper of cargo *ex* Julia Blake, at Rio,' and sent the same by steamer to Rio de Janeiro, as follows: 'Dear Sir, We have to advise that the brigantine Julia Blake put in here on the 27th ult., dismasted and leaking. A survey has been held, and, for effecting repairs, &c., the cargo is being discharged. Capt. Knowlton tells us that he has cabled the casualty to the United States. As the cargo is consigned 'to order,' we have been unable to acquaint the New York consignees of the misfortune.' It appears that the shipper of the cargo at Rio received this letter, although his reply was not produced; but, on the 13th of July, he wrote to Lamb & Co., as appears by a letter of Lamb & Co., dated September 28th, 1876, sent to the same address at Rio, in which they say: 'Your favor of the 13th July last reached us recently via Porto Rico, and only after the Julia Blake had sailed from this port. The letter of instructions which you mentioned having given to Captain Knowlton, on sailing from Rio, has never been laid before us, nor did he produce the charter party, although we repeatedly asked for it. He alleged that it had been mislaid or lost at the time of the disaster at sea, and, on being questioned, denied having any instructions from you as to the consignment of vessel in

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The Julia Blake.

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case of average. The bills of lading being 'to order' left us no clue as to the consignees of the cargo. The casualty was, however, at once cabled to the New York Board of Underwriters. While we regret that you should have felt any doubt as to our compliance with your wishes, it will now be clear to you how blameless we are in the matter. Whether Captain Knowlton purposely withheld information from us, or if he actually did lose the documents referred to, remains, at present, open for conjecture only, but the control intended to have been placed with us remained, in part, at least, in the hands of the captain, as master of the vessel. We would suggest that you advise us by mail of the despatch of all vessels conveying instructions from you to our firm. In the event of their putting into this port in distress, we would then, if necessary, be able at once to take up a position with the master, and the protection of your interests at our hands can then not be disputed or ignored. The adoption of such a course on your part, is, we think, more advisable, under present circumstantial means of mail communication between Rio and St. Thomas. Capt. Knowlton was a disagreeable person, and incurred heavier expenses than we would have sanctioned, had he consulted us. He made accounts without our knowledge, and we only became aware of the large amount of expenses when the Julia Blake was actually ready for sea, on the same being rendered to us, with captain's signature on them, for payment, as consignees.' Although Lamb & Co. were examined as witnesses and asked to produce all the correspondence with the shipper of the cargo, the letter of the shipper, of the 13th of July, was not produced nor its non-production accounted for, nor was any letter received by them, or the master, from the shipper, produced on the trial. This is all that appears in the case, as to any correspondence with the shipper. From the contents of the letter of Lamb & Co., of September 28th, it may be inferred that the shipper of the cargo received and replied to their letter of June 1st on the 13th of July, and that he complained that they had neglected his interests. The great delay in the receipt of

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The Julia Blake.

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his letter of July 13th is not accounted for. The shipper of the cargo, immediately upon receiving the bills of lading from the master, sent them, endorsed by himself, to Winthrop Cunningham & Sons, of Philadelphia, who were the owners of the cargo, except about 200 logs, which belonged to Mee, the shipper at Rio. They received the bills of lading, together with a copy of the letter of instructions to the master and a copy of the charter party, before the arrival of the vessel at St. Thomas. Cunningham & Sons received no communication whatever from the master or Lamb & Co., and had no information of the disaster or repairs to the ship till her arrival in New York, except that they saw in the newspapers, about June 2d, a telegraphic item of news, that the vessel had put into St. Thomas, dismasted and leaky. During all the time that the vessel was in St. Thomas there was direct telegraphic communication between St. Thomas and New York, and there was also telegraphic communication between St. Thomas and Rio, by way of New York, London, Lisbon and Pernambuco, from the time of the arrival of the vessel at St. Thomas till the 21st of July, when the telegraphic line between Bahia and Rio was broken, and the communication was not re-established until after the ship left St. Thomas. Immediately after the second survey, which was made on the 8th of June, the repairs of the ship commenced. All the bills for the repair and disbursement of the vessel were paid by Lamb & Co., on being certified as correct by the master.

\* \* \* From this statement it will be seen, as might have been inferred from the description of the injuries to the vessel in the surveys, that a very large part of the expenses was incurred for the permanent repair of the vessel, and, as such, ultimately chargeable exclusively upon the ship, in an adjustment as between ship and cargo. On the 22d of July, the repairs being then completed, the master advertised for proposals for a loan on bottomry and *respondentia* of the ship, freight and cargo, to the amount of \$7,500 or thereabouts, to liquidate the expenses incurred in landing, storing and re-shipping the cargo, and to defray the cost of her repairs and

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The Julia Blake.

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outfit. The notice was extensively advertised, and the libellants, the Bank of St. Thomas, alone, made a proposal: They offered to make the loan at a maritime interest of 14 *per cent*. The offer was accepted and a bond on ship, freight and cargo executed therefor. The libellants made no inquiry whatever, except to satisfy themselves that the security offered was sufficient in amount for the loan. They paid over the money, \$11,600, on the captain's order, to Lamb & Co., who had paid the bills, and they received the bond. The vessel left St. Thomas on the 5th of August. By the Danish law, in force in St. Thomas, material men and mechanics, who supply a foreign ship, and a party advancing the funds to pay the same, can attach the vessel and cargo, to satisfy their claims. \* \* \* The value of the cargo in New York is about \$18,000. The cargo was practically imperishable, not liable to decay or deterioration, except from long exposure to sea water. Upon these facts, the principal question is, whether the bond is void as against the cargo, for the reason that no sufficient communication was had with the owner of the cargo, before the hypothecation of it was made. It is conceded that the amount of the repairs and expenses of the ship at St. Thomas cannot be brought below the value of ship and freight, and that sufficient notice was given to the owner of the ship, and, therefore, that the bond is valid as against ship and freight, but the owners of the cargo contend that the master was not, under the circumstances of this case, justified in pledging the cargo without communicating with its owner, and that the communication in fact had with the shipper at Rio was not sufficient, either as regards the character of the communication, or the time when it was made, or as regards the person with whom it was had. There are, in fact, two questions here—first, whether the master had the power to hypothecate the cargo for these repairs, without communication with its owner; secondly, whether the libellants, as lenders, stand in any better position, in this respect, than the master. Recent English decisions have, certainly, established the rule in that country, that the master, before hypothecat-

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The Julia Blake.

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ing the cargo for the repair of the ship, must communicate with the owner of the cargo, if such communication is practicable under the circumstances. (*The Bonaparte*, 8 Moore, 459; *The Hamburg*, 1 Brown. & Lush., 253, 265; *The Karnak*, Law Rep., 2 Adm. & Ecc., 289, and Law Rep., 2 P. C. App., 509; *The Onward*, Law Rep., 4 Adm. & Ecc., 138; *The cargo ex Sultan*, Swabey, 504; *The Cassa Marittima*, Law Rep., 2 App. Ca., 156.) It is clear, that, by these decisions, so far as the English Courts of Admiralty are concerned, the same rule that has long been applied as to the necessity of communication between the master and the owner of the ship, to justify a bottomry bond, is now applied as between the master and the owner of the cargo, to justify a bond that binds the cargo. But, it is claimed by the learned counsel for the libellants, that this is distinctively an English rule and a new rule even in England, that it has never been adopted in this country, that it is difficult of application and impracticable, and that it is not and ought not to become a rule of general maritime law. In one American case some doubt has been expressed as to whether these English cases truly represent the general maritime law. (*The Eureka*, 2 Lowell, 417.) That sometimes and under some circumstances the master has no authority to hypothecate the cargo, without communicating with the owner, is certainly not a new doctrine in the English Courts of Admiralty. It was very plainly declared by Sir William Scott, in his very justly celebrated opinion in *The Gratitude*, (3 Ch. Rob., 240.) In that case, the principle is laid down and enforced by argument and illustration, that the master is not generally the agent of the owner of the cargo to dispose of or hypothecate it, but only to carry and deliver it according to the contract of affreightment, and that he becomes such agent to dispose of or hypothecate it only from the necessity of the particular case. From this it seems to result, that, if the owner is at hand in the same port, for instance, or easily reached, there is not, in the particular case, any such necessity made out. If this is so, it must always be a subject of inquiry, whether, under the circumstances of the

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The Julia Blake.

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particular case, the action of the master in hypothecating the cargo was justifiable and reasonably necessary. It is not necessary, in this case, to determine whether, in the form in which this rule as to communication with the owner of the cargo has been stated by the English Courts, or in the stringency of their rulings as to the character of the notice to be given, they have gone to a length which seriously and injuriously impairs the power of the master to raise money on ship and cargo in a foreign port, as the learned counsel for the libellants contends. The rule, as stated in the case of *The Hamburg*, and as very justly applied to the particular facts of that case, is certainly reasonable, and seems to be entirely in harmony with the case of *The Gratitude*, thus: 'If, according to the circumstances in which he is placed, it be reasonable that he should—if it be rational to expect that he may—obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken, upon authority and principle, that it is the duty of the master to do so, or at least to make the attempt.' The supposed inconvenience of the rule is no greater than exists in all other cases where the authority of the master to act for the ship or cargo depends upon the particular circumstances of the particular case, of which there are so many familiar instances. Like all similar rules, it is to be reasonably applied. It is urged, as a reason why such communication should not be required, that the owner of the ship has the right to repair and to carry on the cargo to its port of destination, if he elects to do so, instead of transshipping the cargo; that, therefore, the owner of the cargo, could, if notified, only save the maritime interest, by furnishing the money himself; and so, it is further claimed, that, if communication is necessary, the want of it affects only the claim for maritime interest, and that for the principal sum loaned, with interest, the cargo is bound. This argument rests upon the theory, that the owner of the cargo cannot reclaim his goods at an intermediate port; and that the ship has an absolute right to carry them to the end of the voyage, and so to earn her freight. But, the right of

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The Julia Blake.

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the shipper, even in a case where nothing has happened to dissolve the contract, to demand his goods upon payment of full freight at an intermediate port, and an indemnity to the ship against loss and damages, seems hardly to be denied, even in the case cited in support of this proposition. (*Palmer v. Lorillard*, 16 *Johns.*, 348, per Chancellor Kent; see, also, *The Onward*, *supra*.) The contract of affreightment, though a contract mutually binding, establishes the relation of principal and agent, of bailor and bailee, between the shipper and the ship; and, however such a contract might be dealt with by a common law Court, it seems not according to the declared principles of equity upon which Admiralty Courts deal with questions, that the shipper of goods should be denied the right to their possession while in the custody of his agent, if he is willing to pay that agent all that he could possibly receive upon the full performance of the contract. There may be cases where it would be equitable that the ship should receive more than the freight, as, for instance, if the re-delivery of the goods will impose an additional expense on the ship, as, for ballast, or for the re-stowing of cargo, or the like. (See *The N. Hooper*, 3 *Sumn.*, 542, 555.) That the owner of the goods can reclaim them at an intermediate port, at least by payment of full freight, and on indemnifying the ship against all loss arising from their being so reclaimed, seems, therefore, to result from their ownership and the nature of the contract. Why, then, should he not have, equally with the owner of the ship, notice of extraordinary expenditures, involving the cargo as well as the ship, and why should he not have, when the circumstances admit of it, an opportunity to exercise this option to reclaim his goods, on fair terms? (On this point, see 1 *Parsons on Shipping and Adm.*, 231, and notes.) But, whatever may be the rule generally, in the present case the right of the owner of the cargo to reclaim his goods cannot be denied, for, it is conceded that the vessel sailed on the voyage in an unseaworthy condition, in violation of the warranty of seaworthiness contained in the charter party. To deny his right to retake the goods under these circumstances

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The Julia Blake.

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would be the most manifest injustice. The argument, therefore, drawn from the supposed right of the ship to complete the voyage, wholly fails, as applied to this case. Then, recurring to the particular circumstances of this case, we find the facts to be substantially as follows: The master had full notice that the consignee of the cargo was at Philadelphia. Even if it be true that he had lost his letter of instructions, of which there is not sufficient proof, it is not to be presumed, in the absence of evidence, that he had forgotten the name and address of the consignee to whom he was to deliver the cargo at the end of his voyage. He knew the name and address of the shipper at Rio de Janeiro. He knew, or must be presumed to have known, that the ship sailed on the voyage in an unseaworthy condition, as to her spars, sails, rigging and hull, and that she was in need of very extensive and permanent repairs. There is no evidence as to the value of the ship, except her sale in New York, at \$4,500. The master must be presumed to have known, not precisely, but approximately, her value, and very little inquiry as to the probable cost of repairs would have shown that they would far exceed the value of the ship. The cargo was imperishable and easily stored and preserved, and the port was one from which the owner could readily find means of transportation to the United States. There was telegraphic communication between St. Thomas and the United States, at trifling cost. So, also, there was, up to the 21st of July, during which time, if ever, the master was bound to communicate, telegraphic connection with Rio, by which, through the shipper, the master could have obtained all necessary information for communicating with the owners of the cargo, if he had forgotten who they were. If, by his own negligence, he had lost the name and address of his consignee, then he was bound to use this means of recovering them, and the expense proved, of about \$5 25 gold a word, seems to furnish no reason why this means of repairing the consequences of his own negligence should not be employed. But, there is really no evidence to show that he did not know how to communicate directly with his consignee,

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The Julia Blake.

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all the time. Under these circumstances, to hold the master justified in hypothecating the cargo for the repair of the ship, without notice, would be contrary to the admitted principle which makes him only the agent of the owner of the cargo for that purpose in a case of necessity; for, no such necessity exists where the owner is himself thus, by means of the telegraph or the mail, so close at hand. Again, the master is bound, in acting as agent for ship and cargo, to consult, so far as he can, the true interests of both. He must not sacrifice the cargo to the ship. Now, here, he acted in flagrant violation of the rights and interests of the owner of the cargo. Knowing the condition of the ship, he must be presumed to have known that it was not the interest, and would not be the wish, of the owner of the cargo to contribute a large part of the value of the cargo for the purpose of enabling the ship, which was disabled by its own unseaworthiness at the commencement of the voyage, and not by a peril of the sea, to be repaired, in order to complete her voyage. His acts, as agent of the owner of the cargo, were not reasonably judicious, and, I am bound to say, on all the evidence, were not done in good faith. (*The Onward, ut supra.*) The letter sent on the 1st of June, by Lamb & Co., to Mee, at Rio, does not help the master's case. Assuming that it has the same effect as if written by him, it was sent by some roundabout way, so that it did not reach Mee till July 13th. It did not convey any definite information as to the probable cost of the repairs, nor indicate that it would be necessary to hypothecate the cargo. Moreover, Mee was not the party with whom the master was bound to communicate, although he happened, so far as appears, without the master's knowledge, to be the owner of a small part of the cargo. It must be held, therefore, that, under the circumstances of this case, the master was not justified by necessity, in hypothecating the cargo. This case is strikingly like the case of *The Hamburg*, cited above, with some added circumstances of recklessness, negligence and bad faith, and many of the arguments of the learned counsel for the libellants in this case, as to the impracticable character of the rule

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The Julia Blake.

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requiring communication, are met and fully disposed of in the opinion in that case. The point taken, that, by the Danish law, the cargo was already liable at St. Thomas, and that, therefore, the bond is good, is also clearly disposed of by that case and the other English cases cited. That the libellants advanced their money in good faith is not questioned; but that they made no inquiries whatever, except as to the sufficiency of the ship, freight and cargo, to secure the amount of the bond, is admitted. A lender upon bottomry, who makes reasonable inquiries of the proper parties, as to the facts which are essential to justify the master's action in hypothecating the ship, may have a good security, though misinformed as to the facts. This is in the interest of commerce, and secures the masters of ships in distress in foreign ports reasonable means of obtaining funds to refit and continue the voyage. There is no reason why the same principle should not apply to the hypothecation of the cargo. But, the validity of the bond, if upheld in such a case, depends wholly on the fact, that the lender made such reasonable inquiry, and, as the result of it, obtained information which, if true, would sustain the action of the master. The interests of commerce do not require that the same protection should be extended to lenders who do not inquire, though they may lend their money in good faith, believing that the master had the necessary authority. Indeed, the interests of commerce are not aided, but impaired, by having such facilities for borrowing money within the reach of the master. If he makes no inquiries, the lender must stand or fall by the facts as to the master's authority. Making no inquiries, he must be presumed to know what the master knows. (On this point, see *The Hamburg, ut supra, and cases cited; Maclachlan on Merch. Shipping, p. 51.*) At the least, the lender is chargeable with notice of the facts that he could reasonably be expected to discover on inquiry, and, in this case, he certainly could have been expected to discover enough to satisfy him that no communication was had or attempted with the owner, though especially necessary under the particular circumstances.

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The Julia Blake.

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In this case, therefore, there must be a decree in favor of the libellants against ship and freight, and in favor of the cargo against the libellants."

*George De Forest Lord*, for the libellants.

*Everett P. Wheeler and Butler, Stillman & Hubbard*, for the claimants.

BLATCHFORD, J. The only appeal taken in this case is one by the libellant, and is from so much of the final decree of the District Court as dismisses the libel as against the cargo and the proceeds of the copper and junk, and as awards costs to the claimants of said cargo. The only question made, in argument, by the counsel for the libellant, is as to the cargo as no attempt has been made to show error as to the decree respecting the proceeds of the copper and junk.

There is no dispute as to the material facts in this case, as affecting the cargo. Those facts, as found by this Court, were substantially found by the District Court, in its decision. The only question is, whether, on the facts of this case, the cargo is bound by the bond. The point involved is examined with care and thoroughness in the decision of the District Court, and I concur in the views there set forth. I have read the English decisions on the subject, namely, *The Gratitude*, (3 Ch. Rob., 240,) before Sir William Scott, in the High Court of Admiralty, in 1801; *La Ysabel*, (1 Dodson, 273,) before the same Judge, in the same Court, in 1812; *The Oriental*, (3 W. Rob., 243,) before Dr. Lushington, in the same Court, in 1850, reversed by the Privy Council, in 1851, (7 Moore, 398;) *The Bonaparte*, (2 W. Rob., 298,) before Dr. Lushington, in the High Court of Admiralty, in 1850 and 1852, and before the Privy Council twice, on appeal, in 1851 and 1853, (8 Moore, 459;) *The Cargo ex Sultan*, before Dr. Lushington, in the High Court of Admiralty, in 1859, (*Swabey*, 504;) *The Hamburg*, (1 Browning & Lushington, 253,) before the same Judge, in the same Court, in 1863, and

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The Julia Blake.

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before the Privy Council, on appeal, in 1864, (*Id.*, 265;) *The Karnak*, (*Law Rep.*, 2 *Adm. & Eco.*, 289,) before Sir Robert Phillimore, in the High Court of Admiralty, in 1868, and before the Privy Council, on appeal, in 1869, (*Law Rep.*, 2 *P. C. App.*, 509;) *The Onward*, *Law Rep.*, 4 *Adm. & Eco.*, 38,) before Sir Robert Phillimore, in the High Court of Admiralty, in 1873; and *Kleinwort v. The Cassa Marittima*, (*Law Rep.*, 2 *Appeal Cases*, 156,) before the Privy Council, in 1877. The result of these cases is, that it is the law of England, in regard to a bottomry bond covering cargo, given by the master of the vessel, that he cannot hypothecate the cargo, without communicating with the owner of it, if communication with such owner be practicable, and that such communication must state not merely the necessity for expenditure, but also the necessity for hypothecation. In *The Onward*, (*Law Rep.*, 4 *Adm. & Eco.*, 55,) Sir Robert Phillimore states it to have been the judgment of the Privy Council in *The Oriental*, (7 *Moore*, 411,) that a mere statement of injuries done to the ship, and of the consequent necessity of repairs, which would entail considerable expense, unaccompanied by a statement that a bottomry bond must be had recourse to, was not a sufficient communication to the owners. This statement of the law is quoted in the judgment of the Court in *Kleinwort v. The Cassa Marittima*, (*above cited*,) with the remark, that the Privy Council entirely agrees in such view of the law. No case in the United States is cited deciding the points thus referred to. In *The Eureka*, (2 *Lowell*, 417,) it was doubtful whether it was open, on the pleadings, to take the objection that the master did not write sufficiently to the owners of the ship, and not at all to the owners of the cargo, and the conclusion of the Court was, that, if the English cases were of authority here, they would not require the bond to be set aside.

In the present case, the point is taken in the answer of the claimants of the cargo, that the vessel, at the time she was in St. Thomas, was consigned to the claimants in New York, as owners of her cargo, and that she had been consigned in St.

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The Julia Blake.

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Thomas to the agents of the claimants there, as was well known to her master; that means of speedy communication with the owner of the vessel, and with the claimants, as owners of her cargo, as also with the charterer of the vessel and the shipper of her cargo, existed and were well known to said master and to the libellant, and that, although such means existed, said master did not communicate with the owner of the vessel, nor with the claimants, nor with either of them, relating to the execution of said bottomry; that said master had no authority or necessity for the execution of the same, as was well known to the libellant; and that the said bond, having been executed without such authority or necessity therefor, is void as against the vessel and her cargo.

The rule laid down in the case of *The Hamburg*, (1 *Browning & Lushington*, 273,) by the Privy Council, as deduced from the judgment of the Privy Council in the case of *The Bonaparte*, (8 *Moore*, 473,) is, that "if, according to the circumstances in which he is placed, it be reasonable that he should—if it be rational to expect that he may—obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken, upon authority and principle, that it is the duty of the master to do so, or at least to make the attempt." As to this rule, the Privy Council say, in *The Hamburg*, that they are unable to discern any novelty in it, either in the principle on which it rests, or in its application to the case of the hypothecation of the cargo of a ship by the master; that the question, whether a master must communicate or not, is one which can only be decided by the circumstances in each particular case; and that this principle was recognized by Sir William Scott in *The Gratitude*. They further say: "As to the supposed inconvenience of the rule, their lordships do not forget that the lender of the money is the party interested in the event of the suit, and not the master. But there is no hardship in requiring from one who is about to advance a large sum of money under such circumstances, that he should enquire of the master whether he has communicated, or made an at-

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The Julia Blake.

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tempt to communicate, to the owners the circumstances of his distress and what he proposes to do in regard to their goods. And it must be remembered, on the other hand, that the owners of the goods are equally interested, and, unless communicated with, have not the same means of protecting their own interests, which the lender undoubtedly has. If it be said that a decision in their favor will tend to increase the difficulty of procuring loans in foreign ports for the repair of vessels in distress, it may also be said, on the other hand, that it will tend very much to the benefit of commerce in general, to discourage improvident or fraudulent advances." The reason for communicating with the owners of the cargo is well expressed by the Privy Council in the case of *The Hamburg*, in this language: "The character of agent for the owners of the cargo is imposed upon the master by the necessity of the case, and by that alone. In the circumstances supposed, something must be done, and there is nobody present who has authority to decide what shall be done. The master is invested, by presumption of law, with authority to give directions, on this ground—that the owners have no means of expressing their wishes. But, when such means exist, when communication can be made to the owners, and they can give their own orders, the character of agent is not imposed upon the master, because the necessity which creates it does not arise." In the case of *The Lizzie*, (*Law Rep*, 2 *Adm. & Ecc.*, 254,) Sir Robert Phillimore, citing, as authority, the cases of *The Gratitude*, *The Bonaparte* and *The Hamburg*, says, that, if there be an opportunity for the owners of the cargo to express their will as to advancing the requisite funds, or as to unloading their cargo altogether, the master, who is the agent of necessity and not of their choice, has no right to deprive them of this opportunity, and, therefore, must communicate with them, if it be reasonably within his power to do so. In the case of *The Onward*, (*Law Rep.*, 4 *Adm. & Ecc.*, 38,) the same Judge says: "When the circumstances permit, the master must communicate with the owner before he does any acts which seriously affect the value of the

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The Julia Blake.

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ship in the one case, or of the cargo in the other. This is a doctrine at which the English Courts have slowly but steadily arrived." This rule of the English Courts seems entirely reasonable, and one which should be applied to the present case.

The master had notice that Cunningham & Sons were consignees of the cargo, at Philadelphia. He made no communication to them. He might have done so by telegraph at all times, and have received a speedy answer. He made no communication to Mee. The letter of June 1st, 1876, from Lamb & Co. to Mee, was sent by such a route that it did not reach him till July 13th. It contained no information as to the amount of the damage to the vessel, or as to the cost of the repairs, nor did it suggest bottomry. No other communication was made to Mee. Before July 21st, a telegram would have reached him at once, and, after that date, in about five days. But the master was told, by his letter of instructions, that Cunningham & Sons were the consignees of the whole of the cargo, and thus the proper persons to be communicated with; and, if he had lost his letter of instructions, and had forgotten the name and address of the consignees, he could have learned both by communicating, by telegraph, with Mee. The newspaper notice of the disaster to the vessel, which the claimants saw on June 2d, was not such a notice as called upon them to act. It conveyed no suggestion that a hypothecation of the cargo was probable or intended. The other points involved, growing out of the special circumstances of this case, are fully discussed and properly disposed of, in the opinion of the District Court.

As the suit is wholly upon the bond, and as the bond is void, as respects the cargo, for want of authority in the master, acting as agent for the owners of the cargo, to give it, it follows that the bond cannot be sustained against the cargo, to any extent.

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Clarke v. Johnson.

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THOMAS W. CLARKE, TRUSTEE, &amp;C.

vs.

JOHN JOHNSON. IN EQUITY.

The first claim of the reissued letters patent, No. 3,579, granted, August 3d, 1869, to Nathaniel Jenkins, for an "improvement in the manufacture of elastic packing," namely, "An elastic packing composed of at least four-tenths of finely pulverized refractory earthy or stony material, intimately mingled with, and held together by, rubber prepared for vulcanizing, and then vulcanized, as and for the purpose described," includes only soft vulcanized rubber, and does not include hard rubber, or vulcanite, so called, made of rubber mingled with 25 *per cent.*, or over, of sulphur, and then vulcanized.

(Before BENEDICT, J., Eastern District of New York, July 21st, 1879.)

BENEDICT, J. This action is brought to obtain an account and also an injunction to restrain the defendant from manufacturing and selling a certain kind of rubber disc used as packing for steam joints. The bill sets forth letters patent owned by the plaintiff, issued to Nathaniel Jenkins, and known as reissue No. 3,579, dated August 3d, 1869, for an "improvement in the manufacture of elastic packing." It also sets forth a decree rendered by the Circuit Court of the United States for the Southern District of New York, in the year 1871, rendered in an action brought by the plaintiff against this defendant, upon this same patent. (9 *Blatchf. C. C. R.*, 516.) It also sets forth a decree upon pleadings and proofs, rendered by the Circuit Court of the United States for the District of Massachusetts, on the 22d of March, 1872, in an action brought by this plaintiff upon this same patent against George W. Walker and another. (1 *Off. Gaz. of Pat. Off.*, 359.) General acquiescence is also averred, and infringement by the defendant.

The first claim of the patent sued on, which is the only claim here involved, is in the following language: "An elas-

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Clarke v. Johnson.

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tic packing composed of at least four-tenths of finely pulverized refractory, earthy or stony material, intimately mingled with, and held together by, rubber prepared for vulcanizing, and then vulcanized, as and for the purpose described."

Upon this bill and certain affidavits, the plaintiff now moves for a preliminary injunction. The defendant reads, in opposition to the motion, his answer, in which the equity of the bill is denied, and he puts in evidence, in support of his denial of novelty, a number of patents prior in date to the invention of Jenkins, and, in support of his denial of infringement, a number of affidavits, and he insists that this evidence either defeats the Jenkins patent entirely, upon the ground of want of novelty, or compels a construction of it so limited as to exclude from its scope the article which the defendant now manufactures.

In a case like this, where it appears that the patent sued on has been twice sustained upon final hearing, in contested actions, before different Courts, in one of which the defendant was the same person who is defendant here, it can hardly have been expected, that, upon a preliminary motion like the present, a construction would be given in conflict with any construction given to the patent by the distinguished Judges who were called on to consider the patent in the former cases set up in the bill. Neither would it, in my opinion, be proper to deny the present application because of any doubt in regard to the validity of the patent, that the defendant may consider to have been raised by the patents prior in date to the Jenkins invention or the rubber balls which have been now, for the first time, proved. For, these patents, now newly exhibited, and the prior manufacture of the rubber balls, could have been proved by the defendant in the former action against him, but were not then relied upon. No evidence has been here produced to show that any articles were ever made in accordance with any of these patents, except by way of experiment. Nor do the affidavits show the employment of the rubber balls for the purpose of resisting the action of heat in steam valves. Moreover, some eight years have

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Clarke v. Johnson.

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elapsed since a decree was rendered against the defendant for an infringement of this patent. During all this period he has, as he says, acquiesced in the validity of the patent. During all this period it has occurred to no person that the patent could be defeated by the production of the patents that are now exhibited for that purpose, although packing was constantly made under the patent, and sold publicly as a patented article, during all this period.

Under such circumstances, I should have little hesitation in compelling the defendant to await a final decree before putting upon the market an article adapted for precisely the same purpose as the Jenkins packing, and very similar thereto in appearance, if his right to manufacture this article depended solely upon the question of the invalidity of the Jenkins patent for want of novelty. But another, and, as I view it, more serious ground of defence is the denial of infringement. This denial raises the question whether the Jenkins patent covers the packing which the defendant now seeks to make and sell. The nature of the defendant's present manufacture is not left in doubt, upon the affidavits, although the evidence in regard to it is not, in all respects, harmonious.

The moving papers show valve seat discs made by the defendant, similar in form and general appearance to those made under the Jenkins patent, and adapted to accomplish the same purpose, viz., to constitute an elastic packing for steam joints and valves, that will render the valve tight and successfully resist the corrosive action of the steam. The moving papers also present an analysis of the defendant's discs, according to which they are compounded of the following elements, viz., rubber, 38.97 *per cent.*; sulphur, 7.23; bone black, 52.89; sand, dirt, .91. This analysis shows, according to the somewhat ambiguous statement of the plaintiff's witness, "a rubber packing compound consisting of more than 40 *per cent.*, (including the sand,) of refractory mineral matter, with 52 *per cent.* of carbon and about 6 *per cent.* of sulphur in a pulverized state, intimately incorporated with, and held together by, vulcanized india rubber or caoutchouc."

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Clarke v. Johnson.

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The defendant denies that his discs are compounded as stated by the plaintiff's witness, and says that he never made, sold or used such a compound as the plaintiff describes, but that all the discs he has made for sale or use have been made upon the following formulas: para rubber, 10 lbs.; gutta-percha, 5 lbs.; sulphur,  $4\frac{1}{2}$  lbs.; bone black,  $22\frac{1}{2}$  lbs.—or, para rubber, 14 lbs.; gutta-percha, 7 lbs.; sulphur, 6 lbs.; bone black, 28 lbs. These formulas the defendant says he has always used, except that he has sometimes slightly increased the quantity of sulphur, so as to bring it up to the proportion of 5 ounces of sulphur to 1 pound of rubber and gutta-percha together.

I suppose there is no good reason to doubt the truth of the defendant's statements as to the compound of which his discs are composed, and that the subject of the present controversy may justly be considered to be valve seats for steam joints, made as the defendant says he makes them. The question then first arising is, whether the decree rendered in the action between the same parties upon the same patent precludes all enquiry in regard to the right of the defendant to make and sell valve seats such as he says he is now making. Here the burden is upon the plaintiff; and, accordingly, he has exhibited the pleadings and decree in the former action between these same parties, together with an affidavit tending to show that the valve seat discs which formed the subject of such former suit were similar in character to the discs which the defendant now claims to be making. In opposition, the defendant produces two affidavits, tending to show that the subject-matter of the former suit was a disc differing in character from the discs now being made by the defendant, in this, that it contained a portion of oxides of lead, copper and tin, which, in the process of manufacture, absorbed a portion of the sulphur used, and that the compound, when vulcanized, consisted of a skeleton of refractory matter equal or exceeding 40 *per cent.* of the mass, mingled with, and held together by, the other portion of the mass, which other portion consisted of soft rubber. The formulas of the defendant, as above given, contain no metallic oxides, or other element capable of ab-

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Clarke v. Johnson.

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sorbing the sulphur in the process of manufacture, and produces a packing that consists of a skeleton of refractory material, exceeding 40 *per cent.* of the mass, mingled with, and held together by, the other portion, which other portion is vulcanite, as distinguished from soft rubber.

Vulcanite and soft rubber are different things, having different properties, and are in no sense equivalents. Vulcanite is produced when rubber is mingled with 25 *per cent.*, or over, of sulphur, and subjected to the vulcanizing process. Soft rubber is produced when the sulphur mingled with the rubber is less than 25 *per cent.* This difference in the proportion of sulphur absorbed by the rubber, and this only, as I understand it, causes the difference in the product. The introduction of a portion of vulcanite, and the withdrawal of soft rubber from the compound, would, therefore, effect a substantial change in the article. Not only would the elements of the compound be changed in respect to the proportion of sulphur employed, but the result would be different. The proofs show, that the capacity of the compound to resist steam is greatly increased by such a change, and the packing is thereby rendered more efficacious.

It must follow, therefore, that if, in the compound that formed the subject of the former suit, the proportion of sulphur absorbed by the rubber in the process of manufacture was less than 25 *per cent.*, the subject-matter of the former suit was substantially different from that here involved. It is impossible to discover, from the face of the record in the former suit, so far as here produced, what was the character of the disc involved in the proceedings. Upon the affidavits read, the weight of evidence is in favor of the defendant's contention, that the discs complained of in the former suit were so compounded that 25 *per cent.* of sulphur was not absorbed by the rubber, and that those discs did not exhibit any vulcanite, but were refractory material held together by soft rubber instead of vulcanite. Indeed, the bill filed in this action nowhere avers that the former suit relates to matter similar in character to that now complained of, and the bring-

ing of this suit seems to indicate that the packing in question must be substantially different from that adjudicated upon in the former action; for, if the defendant had simply resumed the manufacture that was forbidden by the former decree, a new action would be unnecessary.

The burden being upon the plaintiff, and it not being made to appear that the matter now in controversy formed the subject of the former suit, the decree rendered therein can avail nothing upon the question of infringement that is raised here. In so far as concerns the infringement charged, the present is, therefore, to be treated as a new case, dependent, for its determination, upon a question that did not arise in the former suit against this defendant, viz., whether a rubber packing compound, consisting of a skeleton of refractory material, forming at least 40 *per cent.* of the mass, the remainder being vulcanite, mingled through the mass, holding the same together, and forming an elastic packing capable of resisting the action of steam, is within the scope of the Jenkins patent.

This question does not appear to have received the consideration of any Court, nor does any allusion seem to have been made to it in either of the cases referred to, where the patent was sustained at final hearing. There is, in the opinion delivered by Judge Shepley, the expression, "hard rubber," but I do not understand the reference to be to vulcanite. The phrase is used by Judge Shepley, as it has been here, by the plaintiff's counsel, to mean, not vulcanite, but rubber that is hard to compression. And I find no expression, in his opinion, indicating that his attention had been called to the question upon which this case, as I view it, must turn.

That question—to repeat it in a slightly different form—is, whether the invention of Jenkins, as described in his patent, embraces a packing composed of 40 *per cent.* and over of refractory material, mingled with, and held together by, vulcanite, so as to form an elastic packing capable of resisting the corrosive effect of steam. This is a question to be determined by the language of the patent, read in the light of the

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Clarke v. Johnson.

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evidence in respect to the state of the art. The language of the claim in the patent has been already given, and seems clearly to be broad enough. Rubber, mingled with 25 *per cent.* and over of sulphur, and then vulcanized, is as plainly covered by the words, "rubber prepared for vulcanizing and then vulcanized," as is rubber mingled with less than 25 *per cent.* of sulphur. These words, taken by themselves, are broad enough to cover both compounds, but the difficulty is, that they must be read in connection with the words, "as described," by which words reference is made to the specification for the meaning of the phrase, "rubber prepared for vulcanizing," used in the claim. Turning, then, to the specification, it is found carefully to state the limits of the proportion of sulphur to be used, and fixes that limit at "from one to three *per cent.*" In all places where the proportion of sulphur to be used is spoken of, the proportion is less than the proportion absolutely necessary if the product is intended to be vulcanite. The language of the specification, therefore, plainly excludes from the scope of the patent a compound where the proportion of sulphur used is such that the product is vulcanite.

The difference between vulcanite and soft rubber was well known to the patentee. Equally well known was the fact, that, by using less than 25 *per cent.* of sulphur, in combination with rubber, soft rubber is produced, and, by using 25 *per cent.* and over of sulphur, in combination with rubber, vulcanite is produced. If, therefore, Jenkins had considered his invention to include a packing where the refractory material was to be mingled with, and held together by, vulcanite, it is not conceivable that his specification would have fixed the limit of the sulphur to be used at from one to three *per cent.*

In behalf of the plaintiff, it is said, that Jenkins' patent does not provide that the formula should be simply of soft rubber, but the patent says: "With the following ingredients the proportion would be within the following limits," and then gives the limits of sulphur at "from one to three *per*

*cent.*” There is added the statement: “I do not confine myself to these exact proportions, but consider the composition most accurately stated by the limitations given before.” These limitations exclude a composition which would produce vulcanite. This statement shows, that the idea of so compounding his packing as that it should be refractory matter mingled with, and held together by, vulcanite, had not occurred to Jenkins. Read in the light of the specification, the claim of the patent covers simply an elastic packing composed of at least four-tenths of finely pulverized refractory, earthy or stony matter, intimately mingled with, and held together by, rubber prepared for vulcanizing, by using less than 25 *per cent.* of sulphur.

This understanding of the patent derives support from the circumstance, that no evidence is produced to show, that, under the Jenkins patent, a packing has ever been produced where the refractory material was held together by vulcanite; and from the further fact, so strongly stated by various witnesses, that such a packing as the defendant now makes was never known until within a year, and that it will outlast all elastic packing previously known, and is considered, by those having occasion to use packing, to involve an important discovery in regard to the efficiency of vulcanite, when used in connection with refractory material, for the purpose of packing steam valves. Such an understanding of the Jenkins patent, as I have above stated, is fatal to the present motion, for the reason, that, according to the weight of the evidence, the defendant’s packing is always so compounded as to furnish, for absorption by the rubber, more than 25 *per cent.* of sulphur, and, when vulcanized, never contains soft rubber, and invariably contains vulcanite, whence results, according to the affidavits, an article essentially different from the article described in the Jenkins patent, not only being compounded in a different manner, but possessing different properties, and being more efficacious to effect the object sought to be attained by both articles than it is possible for the Jenkins packing to be.

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Colgate v. The Gold and Stock Telegraph Company.

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The motion for a preliminary injunction must, therefore, be denied.

*Thomas William Clarke*, for the plaintiff.

*Alexander Cameron* and *James H. Gilbert*, for the defendant.

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CLINTON G. COLGATE

vs.

THE GOLD AND STOCK TELEGRAPH COMPANY.

The decision of this Court in *Colgate v. The Western Union Telegraph Company*, (15 Blatchf. C. C. R., 365,) confirmed.

The considerations stated which apply to a case where, after a patent has been sustained on final hearing, a new defendant, in a new suit, seeks to attack the patent for want of novelty.

What degree of clearness and certainty of description is required in a prior publication, in order to defeat a patent.

Where, on a patent issued in 1867, a suit was brought, in 1872, against its most conspicuous and extensive infringer, and was prosecuted with reasonable diligence, that was sufficient notice to all other infringers that the right conferred by the patent was to be maintained, to require a particular defendant who alleges laches in the plaintiff, to show affirmative acquiescence by the plaintiff in the use of the invention by the defendant.

Form of an order for a preliminary injunction on a patent, in a case where the plaintiff exercises his rights by granting licenses.

(Before BLATCHFORD, J., Southern District of New York, July 22d, 1879.)

BLATCHFORD, J. This is a motion for a preliminary injunction to restrain the infringement of letters patent granted to George B. Simpson, May 21st, 1867, for an "improvement in insulating submarine cables." This patent has been sustained as valid by this Court, on final hearing, in a suit brought on it by the same plaintiff against the Western Union

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Colgate v. The Gold and Stock Telegraph Company.

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Telegraph Company. (15 *Blatchf. C. C. R.*, 365.) The claim of the patent is as follows: "The combination of gutta-percha and metallic wire in such form as to encase a wire or wires, or other conductors of electricity, within the non-conducting substance gutta-percha, making a 'submarine telegraph cable,' at once flexible and convenient, which may be suspended on poles in the air, submerged in water, or buried in the earth, to any extent, for atmospheric or submarine telegraphic communication, and for other electric, galvanic and magnetic uses, as hereinbefore described." Infringement by the defendant, by the use of the invention thus claimed, is not denied. The sole defence to the motion is an attack on the novelty of the invention. Under such circumstances, when the patent has been sustained on final hearing, against the largest and most wealthy telegraph corporation in the country, after exhaustive research and full testimony and argument, and when, as here, the Western Union Telegraph Company is shown to own nearly one-half of the capital stock of the defendant, and the relations of the two companies are shown to be such that the defendant is substantially a part of the Western Union Telegraph Company, it is incumbent on the defendant, in adducing any new matter in this case, on this motion, to make it extremely probable, at least, that, if such new matter had been put in evidence in the former case, a different result would have been reached by the Court.

In construing the specification of the patent, in the former case, the Court said, in its decision: "It is plain, from the language of this specification, that the point of the invention is to make use of the fact that gutta-percha is a non-conductor of electricity, to insulate, by means of gutta-percha, a metallic wire, which is a conductor of electricity, and thus prevent the escape of electricity from the metallic wire, when it is suspended in the air, or submerged in water, or buried in the earth, when, but for such insulation, the electricity would escape from the metallic wire. The mode of insulation described is to combine the gutta-percha and the metallic wire in such manner that the wire will be covered on all sides

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*Colgate v. The Gold and Stock Telegraph Company.*

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with a uniform coating of gutta-percha. Adequate means of softening the gum and putting it into such condition as to permit it to be so combined with the wire are set forth; and it is declared, that such mode of combination and insulation confines the electric current to the wire, and shields the wire from contact with all external electric influences. It is manifest that the gist of the invention is the discovery of the fact that gutta-percha is a non-conductor of electricity, and the application of that fact to practical use, by combining it, by the means specified, with a metallic wire, in the manner described, and then using the cable formed by such combination for the purpose of conducting electricity along the enclosed wire." In regard to the novelty of the invention the Court said: "Nothing that has been put in evidence by the defendant carries back the publication of the discovery of the insulating properties of gutta-percha to a date earlier than the 1st of March, 1848. That is the date of the publication in England of the discovery of such properties by Faraday. It is entirely clear that Simpson had, prior to that time, made a like discovery." The Court then took as the date of the discovery by Simpson, the 24th of January, 1848, being the day on which he swore to his first specification, which he filed in the Patent Office on the 31st of January, 1848, which was a date sufficiently early to antedate the publication of Faraday's discovery, although the plaintiff contended for a date as early as November 22d, 1847.

An extract from a work in German, called Dingler's Polytechnic Journal, was put in evidence in the former case. A translation of the material parts of it was as follows: "Insulation of the wires of electric telegraphs. The public papers announce, that the experiments which the Prussian Government is having tried at present, in respect to the most serviceable mode of constructing electric telegraphs, are turning out very favorably for the laying of the wires underground in coatings of gutta-percha, so that, probably, all public telegraphs will be laid in this manner. \* \* \* If the insulation of the wires underground, discovered by Lieu-

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*Colgate v. The Gold and Stock Telegraph Company.*

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tenant Siemens, keeps good, all important towns can be easily connected with the capital." In regard to this extract, the Court said, in its decision: "The publication in Dingler's Polytechnic Journal of 1848 gives an account merely of experiments then in progress, and not of a completed invention, even if the part of it in question was published prior to Simpson's invention, and it does not set forth the insulating or non-conducting property of gutta-percha for use with a telegraphic wire under water." The defendant now introduces in evidence a publication in German, which was not in the former case, namely, the Bremen Gazette, of Sunday, December 19th, 1847, which contains an article, of the material parts of which the following is a translation: "Berlin, December 16. The trials which the Government here is, at this time, causing to be made concerning the introduction of electromagnetic telegraphs best answering the purpose, do result, in the highest degree, in favor of laying the wires underground in coatings of gutta-percha, so that, probably, all Government telegraphs will be constructed in this manner, and it will be no longer necessary then to use for that purpose the railroad embankments, but the turnpikes may be used, under the pavement of which the lines will find safe location, and no special guarding of the same will be necessary. The trials, under the direction of Major-General O'Etzel, of Privy Councillor of Finance Mellin, and of Professor Dove, who constitute the Royal Commission, are carried out by Lieutenant Siemens. \* \* \*

If the insulation of wires underground, invented by Lieutenant Siemens, proves lasting, then, by means of it, all the principal cities may be easily put in communication with the capital." It is very manifest that the article in the Bremen Gazette conveys no more information than the article in Dingler's Journal, so that this defence was passed upon in the former case. Neither of them describes, or would enable any person to construct, a telegraph cable, consisting of a telegraph wire, covered, as Simpson's specification states, "on all sides, with a uniform coating of gutta-percha," such cable being "flexible and convenient," and capable of being "sus-

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*Colgate v. The Gold and Stock Telegraph Company.*

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pended on poles in the air, submerged in water, or buried in the earth." All this is embraced within the definition of the invention and the construction of the claim, given in the former case. There must not only be insulation by means of gutta-percha, but insulation "by the means specified" and "in the manner described." The extent of the article in the Bremen Gazette is, that the wires are laid "underground in coatings of gutta-percha," and thus insulated. How the coatings of gutta-percha are applied, or what their extent is, is not stated, nor is it said that the wire is covered on all sides with the coating, or that the covered wire is flexible or is capable of being suspended on poles in the air or submerged in water. The affidavit of the defendant's expert, Mr. Renwick, does not advert to these considerations, nor does that of Mr. Griffin, nor that of Mr. Pope, nor that of Professor Doremus. On this subject the affidavit of Mr. Burrill, on the part of the plaintiff, says, that the article in the Bremen Gazette is substantially identical with that in Dingler's Journal. It says, further: "Said publication in the Bremen Gazette and in Dingler's Polytechnic Journal did not, in my opinion, at the time they were published, convey any sufficiently intelligible information of the insulation of a wire with gutta-percha in such form that it could be used for a submarine cable. It is easy now for us to think that we understand the exact construction of the telegraph line of Siemens referred to in those publications. But this is on account of our knowledge outside of those publications, and not from any information derived from the publications themselves. The only statement in either of those publications, in regard to the construction of the telegraph line which was then undergoing trial, is, that the experiments or trials were resulting 'in favor of laying the wires underground in coatings of gutta-percha.' How those coatings were to be applied is not stated, nor is it stated that the wire is to be wholly encased, as described in the Simpson patent, with a uniform coating of gutta-percha. Obviously, the general wording of the description will apply to other modes of in-

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Colgate v. The Gold and Stock Telegraph Company.

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insulating the wires than that described in the Simpson patent.

\* \* \* It thus appears, that there were a number of ways of 'laying wires underground in coatings of gutta-percha,' and no one of those ways, as at that time devised, was a practical method of constructing a submarine cable, nor were any of those ways the mode of insulating a telegraph cable shown in the Simpson patent, to wit, that of encasing a wire on all sides in a uniform coating of gutta-percha, and forming thereby a 'flexible and convenient' telegraph cable. The extracts from the Bremen Gazette and Dingler's Polytechnic Journal, therefore, fail to convey any sufficient information as to the method of insulating a telegraph wire with gutta-percha so as to fit it for use for a submarine cable, and they do not tell how it was fitted for use as a subterranean telegraph." Professor Morton, in his affidavit on the part of the plaintiff, says: "The extract from the Bremen Gazette is substantially identical, so far as it purports to describe any experiments or trials with gutta-percha, with the extract from Dingler's Polytechnic Journal, which I examined in the previous case.

\* \* \* In the previous case I expressed the opinion, that the description in the Polytechnic Journal was insufficient to enable any one skilled in telegraphing at that time to insulate a telegraphic wire with gutta-percha, and I still adhere to that opinion, and the opinion applies with equal force to the extract from the Bremen Gazette. The extracts from the Bremen Gazette and from Dingler's Polytechnic Journal merely convey the information that experiments were turning out well for the insulation of the wire with gutta-percha. The final result of those experiments is expressly stated in the publications not to have been reached, and no description whatever is given as to the method of applying the insulation to the wire, except the general phrase, that the wires are laid under the ground, 'in coatings of gutta-percha.' At that date, in 1847 and 1848, submarine and underground telegraphy were practically unknown. Experiments had been tried, as I find from the literature of the subject, with many substances, and coatings had been formed of such substances

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Colgate v. The Gold and Stock Telegraph Company.

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in many ways, but, up to that time, without success. Wires had been wrapped with thread or yarn, and varnished, and such a mode of coating would be included under the general phraseology of the articles in the Bremen Gazette and Dingler's Polytechnic Journal. Wires had been laid in pipes or channels of wood, varnished with resinous matter, and such a mode of laying underground might be included in the general phraseology. Wires had been laid in lead pipe, filled with asphalt, pitch, wax, and other substances, and such mode of coating might be included. Wires had been laid in tubes which had coatings of gutta-percha alternating with insulating supports of earthenware, and this mode would be included in the general phraseology of said articles. Coatings might have been applied at intervals along a line of telegraph laid in a subterranean channel way, which would insulate the wire from the sides of the channel way, and support it at such intervals. Other modes of laying wires in coatings of gutta-percha might be included in the phraseology of said articles, other than the mode of encasing the wire in a complete uniform coat of gutta-percha, such as is described in the Simpson patent. While, therefore, it is easy for us, at the present day, to suggest, from our knowledge since acquired, what Lieutenant Siemens might have done, and to now suggest that his wires were completely covered, along their whole length, with continuous and homogeneous or uniform coatings of gutta-percha, yet that information was by no means conveyed to the telegraphic world by the publications of the Bremen Gazette and Dingler's Polytechnic Journal."

The foregoing observations apply, also, to the Rutter patent of December 23d, 1847, except that the wire cords of Rutter were flexible. As pointed out by Mr. Burrill, in his affidavit, the Rutter patent does not describe or suggest the insulating or non-conducting property of gutta-percha for use with a telegraph wire under water, nor does it describe a wire completely covered with a uniform coating of gutta-percha, and adapted for use as a submarine telegraph cable or even as a subterranean cable. Mr. Burrill comments on the language

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Colgate v. The Gold and Stock Telegraph Company.

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of the Rutter specification, and says: "In my view, the specification of Rutter, so far as it relates to the use of gutta-percha, is too meagre and insufficient to convey any practical information in regard to insulating and covering a wire with gutta-percha for any purpose, and contains no hint of the use of gutta-percha as a submarine or subterranean cable insulator." Professor Morton, in his affidavit, examines the specification of the Rutter patent, and states, that, in his opinion, it conveys even less information than the extracts from Dingler's Journal and the Bremen Gazette. He also says: "It is impossible to gather from the slight mention made, in this specification, of the uses of gutta-percha, what the patentee understood of its uses or capacities, and I am by no means convinced by the specification, that the patentee supposed that gutta-percha was itself an insulating material. However that may be, the patent does not describe the invention described and claimed in the Simpson patent, of a wire adapted for submarine insulation by being encased in a complete and uniform coating of gutta-percha. A covering which would be 'suitable' to protect a swinging cord from rain, dust or contact, as I stated in the former case, in reference to the Wharton patent, would 'not be at all likely to be, and certainly would in no wise necessarily be, equivalent to the article produced by following the directions of the Simpson patent, or, indeed, available as an insulating conductor for submarine use;' nor would the suggestion of the use of a flat strap 'of leather, gutta-percha or other insulating substance affixed to the hand rail' of an engine, convey any sufficient information of a submarine cable insulated with gutta-percha. Both the construction and conditions of use suggested in the Rutter patent are so essentially different from those described in the Simpson patent, that no one, by following the directions of the Rutter patent, could intelligently construct Simpson's insulated cable." He further states, that, in his opinion, the Rutter patent, for the reasons set forth in his affidavit, does not contain any description of the invention described and claimed in the Simpson patent.

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Colgate v. The Gold and Stock Telegraph Company.

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It is pointed out on the part of the plaintiff that Mr. Renwick, in his affidavit for the defendant, omits to say that he finds in either the Bremen Gazette or the Rutter patent the invention described and claimed in the Simpson patent or that, from either of those publications, he could construct a cable insulated with gutta-percha and adapted for the uses claimed by Simpson; and that the fact that Mr. Renwick is silent on this point is entitled to very great weight in considering the force of these defences. There is great force in these observations. The defects in the affidavits of Mr. Griffin and Mr. Pope and Professor Doremus, before pointed out, in connection with the article in the Bremen Gazette, exist equally in regard to the Rutter patent.

The affidavits of the experts for the defendant, and the argument of its counsel, are largely founded on the erroneous view, that Simpson's patent is invalid if he was not the first discoverer of the insulating property of gutta-percha. It is true that, in the former case, it was held, on the evidence, that Simpson was the first discoverer of the insulating property of gutta-percha, being prior to Faraday, and the publication in the Dingler Journal not being an account of a completed invention. But, as before stated, the claim of the patent is not for that discovery, but is for the means and manner by which that discovery is made use of, to construct such a cable as the specification describes, for such use as is specified.

It appeared in evidence, in the former case, that, in February or March, 1848, Simpson was in Baltimore, exhibiting to Professor Rogers, a gentleman extensively connected with telegraphy, a piece of wire covered with gutta-percha, which he represented as intended to be used under water at draw-bridges in rivers, and that it was then and there tested in water and found to be a good insulator. This evidence is cited in the decision of the Court in the former case. The structure so exhibited at Baltimore was such a structure as is described in the Simpson patent. It is not described in the Bremen Gazette, or in Dingler's Journal, or in the Rutter

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*Colgate v. The Gold and Stock Telegraph Company.*

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patent, or in Faraday's article, or in French's letter of February 10th, 1848. The evidence as to what Craven did, as given in the former case, did not, in my judgment, satisfactorily establish a date for Craven's invention prior to the exhibition by Simpson of such structure in Baltimore. The evidence before the Court in the former case and in this case shows that Simpson embodied his invention in the form of a wire encased in gutta-percha in contact with and adhering to the wire, so as to constitute a flexible cable capable of the submarine and other uses set forth in his patent, before it was embodied in such form by any one else in the United States, and before it was patented or described in any printed publication by any one else; and that he originated and conceived what he claimed to have invented. It is, therefore, not necessary, in this case, any more than it was in the former case, to consider the question whether an earlier date than January 24th, 1848, can be assigned to Simpson's invention.

The foregoing views dispose of the criticisms made on Simpson's specifications of January and February, 1848, for, the invention described and claimed in his patent as issued is shown in existence, in a physical structure, in February or March, 1848, at a date earlier than anything adduced against it. Irrespective of this, as the view adopted in the decision in the former case, that Simpson meant, in his first two specifications, by the expressions "insoluble india rubber" and "gutta-percha," one and the same thing, still appears to be correct, and is not weakened, but is, if anything, strengthened, by what appears in the present case, it is plain, from an examination of the first two specifications of Simpson, that the invention claimed by him in his patent as issued is fully embodied in those specifications. Those specifications, besides saying that the metallic wire is to be first insulated with gutta-percha, say that the wire thus insulated is to be covered, that is, surrounded continuously throughout its whole length, with glass beads socketed together so as to form a close joint, and that a gutta-percha tube is to be drawn over the glass bead chain, and, of course, surrounding and covering the wire

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*Colgate v. The Gold and Stock Telegraph Company.*

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continuously throughout its whole length, such outer gutta-percha tube being "jointed, cemented and banded together so as to be both water and air-tight." They also state, that it is the outer non-conducting gutta-percha tube, "which encases the whole chain," that throws up an interminable, that is, impassable, barrier between the great volume of water outside of the tube and the interior of the tube, and thus effectually confines and controls the current of electricity passing over the telegraphic wire. They also state, that the joints in the glass chain and the elasticity of the outer gutta-percha tube make the whole sufficiently flexible to give any desired curve. They speak distinctly of using the structure to conduct electricity through water, and call it a submarine conductor of electricity, and it is plain that Simpson designed it especially for submarine use. As remarked in the decision in the former case, the specification of February 21st, 1848, "claims the combination and arrangement of the gums (that is, the interior insulating layer of gutta percha and exterior tube of gutta-percha) around the wire, as the controlling power which confines the current of electricity to the wire, and prevents its passing off, and it leaves out any claim to the glass beads in connection with the gutta-percha, whatever operation the glass beads may have as non-conductors of electricity." It is manifest, that, in the structure described in the first two specifications, the interior covering of gutta-percha and the glass beads and the outer tube of gutta-percha are intended to be compact and not loose, and that the outer tube would act to insulate the wire and produce the described result, as effectually as if it were in close contact with the wire or with the interior covering of gutta-percha. The specifications show that Simpson regarded the outer tube and the inner covering as both of them acting to insulate the wire.

As Simpson's attention was directed chiefly to making a cable for submarine use, when he had produced such a cable he had produced one which could, as the specification of his patent states, be "suspended on poles in the air," "or buried in the earth," as well as "submerged in water." Undoubt-

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*Colgate v. The Gold and Stock Telegraph Company.*

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edly, if the structure of Simpson, as described and claimed by him; were described in a publication, or patented, of a date earlier than Simpson's invention, but stated to be made for underground or aerial use, and not stated to be made for submarine use, it could not be subsequently patented for submarine use. But, as Simpson was the first inventor of such structure, he has the right, under his patent, to the exclusive use of it for all telegraphic or electric uses to which it is adapted.

All the views presented on the part of the defendant are covered by the foregoing considerations and by those set forth in the decision in the former case. It results, that nothing is shown to destroy the force of such decision or to throw such doubt upon its correctness as to deprive it of the usual weight to be accorded to such a decision on a subsequent application for a preliminary injunction.

In March, 1872, the former suit for infringement was brought on the patent against the Western Union Telegraph Company. That corporation was the most conspicuous and extensive infringer. That suit was prosecuted with all reasonable diligence by the plaintiff, and was defended with care, research and zeal, by able counsel. The bringing and pendency of that suit was sufficient notice to all other infringers, that the rights conferred by the patent were to be asserted and maintained. Nothing is presented which tends towards showing any affirmative acquiescence by the proprietors of the patent in the use by the defendant in this case of the invention covered by the patent.

The plaintiff, it appears, exercises the rights conferred by his patent, by granting licenses under it. On the 2d of January, 1879, he offered to the defendant a license under the patent on certain specified terms. If the defendant desires to take a license on reasonable terms, it ought to be allowed to do so. There are no data before the Court from which it can be determined what is a proper license fee in respect to the defendant. The proper order to be now entered in this case, is, that a preliminary injunction issue to restrain the defend-

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Colgate v. The Gold and Stock Telegraph Company.

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ant from making the invention described and claimed in the patent, and also from using the said invention, except the identical wires and cables now used by it, and also from selling, transferring, lending, leasing or parting with in any manner, any wires or cables embodying said invention, or conferring upon any other person, persons or corporation, either in whole or in part, or alone or in conjunction or connection with the defendant, any use, of, or right to use, any such wires or cables; that the question of the issuing of a preliminary injunction to restrain the further use of the identical gutta-percha insulated wires or cables now used by the defendant, be postponed until the coming in of the master's report of evidence to be ordered, or until such other or further order as the Court may make in the premises, upon the application of either party; and that it be referred to Joseph Gutzman, Junior, Esquire, a master of this Court, to take proof to be offered by the plaintiff and any opposing proof by the defendant, on the question as to whether or not the license fees offered to be accepted by the plaintiff in his letter to the defendant, dated December 30th, 1878, are or are not reasonable license fees for the future use of the invention aforesaid by the defendant, and, if not, as to what other sums or rates, either greater or less, are such reasonable license fees; and, also, to take such proof as may be offered by the defendant, and any opposing proof by the plaintiff, on the question as to what, if anything, could be substituted for the gutta-percha covered wires now in use, with equally beneficial results or otherwise, and what would be the expense of such substitution and the time necessary to make the same; and that he take and report the evidence on such questions with all convenient speed, but he is not to report any opinion or decision as to such questions.

*Betts, Atterbury & Betts*, for the plaintiff.

*Porter, Lowrey, Soren & Stone*, for the defendant.

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The Niagara.

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## THE NIAGARA.

A vessel carrying fine table salt in sacks, with powdered arsenic in casks, stowed the arsenic so negligently that, during the voyage, by severe weather, the casks of arsenic were broken, so that the arsenic escaped and was distributed on some of the sacks and in the vessel. The vessel, without notifying the consignees of the salt of what had occurred, and without separating the sacks with which the arsenic had come in contact from the other sacks, allowed the sacks to be indiscriminately discharged, so that it was impossible to make such separation afterward. On examination of a sack it was found that the arsenic had penetrated the sack covering and impregnated the salt. Nothing but an analysis of each sack could have determined whether the salt in it was fit for consumption. The commercial value of the salt was destroyed and it was sold for fertilizing purposes: *Held*, that the vessel was liable for the difference between the commercial value of the salt, as sound salt, when it was discharged, and what it sold for for fertilizing purposes.

(Before WAITE, Ch. J., Southern District of New York, July 31st, 1879.)

THIS was a libel *in rem*, filed in the District Court, in Admiralty. That Court decreed for the libellant, and the claimants appealed to this Court. The decision of the District Court, (BLATCHFORD, J.,) was as follows: "The libellant in this case, Charles A. McDowell, in March, 1875, shipped on board of the ship Niagara, at Liverpool, to be carried to New York, 1,950 sacks of fine table salt, called Ashton salt, under bills of lading in the usual form, which recited that the sacks were received by the ship in good order, and were to be delivered in like good order. The libel alleges that the ship carried, on the same voyage, about 100 kegs of powdered arsenic, which were stowed on the main deck immediately abaft, and near to, the main hatch; that a portion of the salt was stowed in the lower hold abaft the main hatch, and another portion on the main deck abaft the main hatch, and the residue in the between decks abaft the main hatch; that the kegs of arsenic were stowed on the main deck immediately between the salt on that deck and the main hatch, and in such position, that, in case the arsenic, or any part of it, should

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The Niagara.

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break loose, or become scattered, during the voyage, it would be in a situation to come in contact, and become mixed, with the salt on the same deck, and with that in the hold below the place of stowage of the arsenic; that the Niagara is a large vessel, having two decks below the spar deck; that, during the voyage, the main hatch, below the spar deck, remained uncovered; that the planks of the two lower decks were in such loose condition as to permit the arsenic, if it were to break loose, to sift through the cracks of said decks and become mixed with the salt stowed in the hold; that, during the voyage, the kegs of arsenic, or a large part of them, either through defect of stowage, or for some other cause, became loose and were broken to pieces, and the arsenic spread over and sifted through the said decks, and down the main hatch, and became scattered throughout those portions of the vessel in which the salt was stowed, to such extent as to render the same, or a great part thereof, poisonous and utterly unsafe and unfit for use, and valueless, or nearly so, and so that it became entirely unsafe to use any part of it for the purposes for which it was intended, or for any other ordinary purpose, or to permit it to be sold or disposed of in market, and the damage to the salt amounted substantially to a total loss of the whole; that the disaster ought to have been guarded against, and would have been prevented by proper care and precaution on the part of the owners and master of the ship, but they failed to exercise such care and precaution; that, by reason of the dangerous condition of the salt, the consignees thereof were not able to dispose of it in the ordinary course of their dealings, but have been obliged to transport and stow it in places of security, to prevent the possibility of its being used as an article of food, and the libellant has thereby incurred expenses of lighterage, labor and storage to a large amount; and that such damage, loss and charges have been occasioned by the improper receipt and stowage of the arsenic, and by the wrongful acts, defaults and want of due care and caution of the owners and master of the ship. The answer avers, that the kegs of arsenic were stowed on the between

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The Niagara.

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decks and not on the main deck ; that a portion of the salt was stowed on the between decks, abaft the second stanchion aft of the chain locker, and the piles or tiers thereof ran back on the between decks to about midway between the last stanchion and the forward combings of the after hatch ; that a portion of the salt was stowed in the lower hold, extending from the stanchion in front of the main-mast back to the tank or chain locker, and thence aft, and the remainder of the salt was stowed on the orlop deck, (an extra deck between the lower hold and the between decks;) that all the salt was stowed abaft the main hatch ; that the sacks of salt on the between decks did not reach within 32 feet of the arsenic, and the rows or tiers of salt on the between decks, nearest the arsenic, were fully protected by matting, so as to render it impossible for the arsenic, under any circumstances, to come in contact with the salt on the between decks ; that none of the salt stowed in the lower hold was stowed immediately under the arsenic stowed on the between decks ; that, in case the arsenic, or any part of it, should have broken loose on the voyage, it would not be in a situation to come in contact with the salt in the lower hold, except so far as small portions of the arsenic might sift through the floor of the between decks ; that none of the salt stowed on the orlop deck could come in contact with the arsenic, if scattered from the kegs in which it was contained ; that no part of the salt in the lower hold was directly under the main hatch for at least 12 feet, such space being stowed with hogsheads of soda ash and dirt ballast ; that there was an aperture around the main-mast, where it passed through the between decks, of small dimensions, where the mast wedges worked during the heavy weather encountered on the voyage, and also two small cracks, one on the port and the other on the starboard side of the between decks, in the space on the floor of the between decks abaft the main hatch, through which, if the arsenic were to break loose, small portions of it might be sifted and fall down on the top tier of the sacks of salt immediately contiguous to said aperture or cracks ; that 30 or 40 of the kegs of arsenic became

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The Niagara.

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loose, during the voyage, and were broken to pieces, not through defect of stowage, but solely on account of extreme stress of weather; that the only arsenic that sifted through the decks was such as escaped through said aperture around the main-mast, and through the said two small cracks on either side of the between decks, and that the same did not cover more than a comparatively small number of the sacks of salt which were in the lower hold immediately under the main-mast, and the ends of the tiers thereof on the port and star-board sides of the lower hold; that, as to those sacks on which the arsenic fell, the salt was not thereby rendered poisonous and unsafe and unfit for use, nor was it incapable of being sold in market; that all proper care and precaution were taken on the part of the owners and master of the ship, to prevent the alleged disaster; and that at least 1,350 bags of the salt were wholly free from arsenic. On the same voyage, there were shipped by the same vessel, under like bills of lading, by one Bowen, consigned to St. John & Avery, 2,850 sacks of fine table salt, called Marshall salt. The consignor and consignees file a libel against the vessel, to recover for a total loss of that salt. The libel in that case makes, in substance, the same averments as the libel filed by McDowell, except that it alleges that the 2,850 sacks were stowed partly in the lower hold abaft the main hatch, and another portion in the between decks below the main deck, and probably a small portion on the main deck, all of it abaft of the main hatch. The answer to the last named libel makes, in substance, the same averments as the answer to the libel filed by McDowell, and alleges that at least 1,950 bags of the Marshall salt were wholly free from arsenic. The salt in question was intended solely for table or other domestic use, and was of the finest quality, and commanded a high price in the market. It was stowed in the lower hold, and on the between decks, and on an intermediate deck called the orlop deck, and, in each case, abaft the main hatch. On the between decks, and abaft the main hatch, but forward of the salt on the between decks, were stowed 99 casks of white

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The Niagara.

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powdered arsenic, each cask being about 20 inches long and containing about 300 pounds. These casks were in three rows across the ship, the heads fore and aft, each cask against the deck below, nothing on top of them, the forward row up against the after combing of the main hatch so far as such combing extended across the deck, but, outside of such combing on each side, nothing to stay the casks, nothing to stay the after row aft, the forward end of the second row against the after end of the first row, and the forward end of the third row against the after end of the second row, the casks being chocked by pieces of wood sidewise and at the end of the rows. The arsenic occupied a space of 5 feet fore and aft directly aft from the main hatch. The nearest salt to the arsenic on the between decks was 30 feet aft of the arsenic. Those bags of salt were piled up all across the between decks, but there was a space of about three feet between the top of them and the deck roof above, and the bags next to the arsenic were covered from the deck floor to the top of the pile, all across, with pieces of matting, which lapped over the top of the pile. The main-mast came up through the between decks in the 30-foot space between the arsenic and the salt. That space was empty. In the lower hold the salt was piled to within about 3 feet of the deck roof above, on both the starboard side and the port side, directly underneath said 30 feet of empty space, the bags of salt on the starboard side projecting a little forward of the main-mast, and those on the port side projecting as far forward as the after part of the main-mast. The after part of the main-mast was 16 feet aft of the after combing of the main hatch. The openings of the main hatch from the between decks to the lower hold were not covered during the voyage. The kegs of arsenic broke loose during the voyage, a large number of them had their heads broken away, and the contents of those were discharged and scattered all about, in the free area which was open in the between decks and in the opening of the main hatch. This tossing about of the loose arsenic continued for a considerable time before any of it could be secured and put

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The Niagara.

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into the casks again, with new heads. The weather was stormy, and, when the casks had been put in place again, after a fashion, the same breaking loose of casks and staving of the heads of casks occurred a second time, and there was the same tossing about of loose arsenic. After all, there was a pile of loose arsenic in the between decks, which remained there during the voyage. The first time the kegs broke loose, 30 or 40 of them had their heads broken, and the loose arsenic and the unbroken kegs seem to have remained free, for 9 days, to follow the motions of the vessel, before anything was done to secure either the loose arsenic or the kegs. The evidence shows that the loose arsenic reached a good many of the bags, and that, in some, it penetrated through the bagging and mingled with the salt. To what extent any bag with which the loose arsenic had come in contact was impregnated by it could not be told, with any safe reliance, except by analysis. The salt and the arsenic were alike white and undistinguishable to the eye. Two bags of the salt were analysed. In one, arsenic was found, to such an extent that there might have been as much as  $3\frac{1}{2}$  grains of arsenic in a pound of salt, less than one grain of arsenic having destroyed human life. In the other bag, arsenic was found in salt taken carefully from the centre of the bag, by digging down. Knowing that the arsenic had so broken loose, the master and officers of the ship not only did not, before breaking out the sacks of salt, or discharging any of them, inform the consignees of the salt of the facts, with a view of separating the sacks on the outside of which the presence of loose arsenic could be detected from those which were clean, nor did they take any steps to make such separation, but they discharged indiscriminately sacks which were clean and sacks which had arsenic on them. There can be no doubt that there were, as the sacks lay in the vessel, after her arrival, before the discharging of the sacks commenced, some sacks which were clean, untouched by arsenic. How many there were can never now be ascertained. Then it was easy to make the separation, because the arsenic was visible to the eye on the

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The Niagara.

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outside of the bag. But, indiscriminate discharging, and the putting of bags with arsenic on them in contact with clean bags, during transportation on lighters and other handling, would not only diffuse the loose arsenic more widely, and contaminate and impregnate bags before clean, but make it doubtful, in many cases, how far bags before clean remained wholly safe. For whatever difficulty thus resulted the ship is responsible. The delivery of the salt commenced on the 16th of April. On that day 775 sacks of the Marshall salt were delivered from the after hatch to a lighter. On the 17th, which was Saturday, 500 sacks of the Marshall salt were delivered from the after hatch to another lighter. On the same day, 200 sacks of the Marshall salt were delivered from the after hatch to the lighter Zouave, and 300 other sacks of the same salt were delivered to the same lighter from the main hatch, some from the lower hold and some from the between decks. On quite a number of those from the lower hold a white powder was noticed by the delivery clerk, and the captain of the lighter refused to receive those as in good order. The fact was mentioned to McFarlane, the master of the ship, and the mate, who must have known what the white powder was, said, on the 17th, in the hearing of the delivery clerk, that he would brush off the white powder, if it was found on any more bags. Yet the delivery clerk did not know until the 19th that the white powder was arsenic, and went on delivering 430 sacks of Ashton salt on the 19th, until he was, on that day, directed to stop delivering. No more were delivered till the 22d. On the 19th, and not till then, the master of the ship informed the consignees of the ship of the breaking loose of the arsenic, and of the delivery of some of the salt, and that he desired the consignees of the salt to be notified that some of the arsenic might have got on to the salt. Thereupon, the master, with Mr. Smith, the representative of the ship, called on the consignees of the Ashton salt, and notified them that there had been arsenic on the ship, and that a large portion of it had got loose. The Ashton salt had been sold to

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The Niagara.

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arrive and was being delivered to the purchaser. The consignees of the salt told the master and Mr. Smith to stop discharging, and then took legal advice, and then notified the purchaser to prevent the use of any of the salt. The action of those in charge of the ship had made it impossible to tell, without chemical analysis, which of the sacks already delivered were affected by arsenic and which were not. Such analysis would have cost more than the value of the salt. The consignees of the Ashton salt at once employed a chemist, Professor Doremus, who went to the ship on the 21st, and inspected the between decks and the lower hold, and the remaining sacks of salt and the kegs of arsenic and the loose arsenic, and took various samples for analysis. At that time 2,205 bags, out of 4,800, had been delivered. The result of the examination and analysis by Professor Doremus was, that he advised the consignees of the salt, that all the salt which came on the ship ought to be used solely for purposes where human life would not be endangered. After that the rest of the salt was discharged and stored separately, and every bag that had been before discharged was put with it. The whole remained for a year and was then sold for manure, under an arrangement between the parties. It satisfactorily appears, from the analyses of the specimens and articles from different parts of the vessel, made by Professor Doremus and Mr. Waller, another chemist, and from their testimony, that the loose arsenic had diffused itself quite extensively through the vessel, and had penetrated through some of the sacks into the salt. The sack analysed by Mr. Waller appeared to him to be clean on the outside, yet he found arsenic in it. Professor Chandler, a chemist, and president of the Board of Health, made, at the vessel, a like examination to that which Professor Doremus made, and caused the specimens to be taken which Mr. Waller analysed, and, on Mr. Waller's report, was of opinion that no harm could come from the use of the salt, because no one person would consume enough of the salt to appropriate to himself arsenic enough to be hurtful. It is contended, for the claimants, that, on the evidence, there was

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The Niagara.

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no ground for any reasonable supposition that the salt in the between decks could have been at all impregnated with the arsenic, or that any portion of the salt in the lower hold could have been so impregnated, except what was in the lower hold directly under the space on the between decks between the after combing of the main hatch and the salt on the between decks; that the master of the vessel had no reason for supposing, when he commenced the delivery of the salt, that the arsenic had contaminated any of the bags of salt other than some in the lower hold, near the main hatch; and that, therefore, the master was guilty of no negligence in not giving notice to the consignees of the salt, of what had occurred, before delivering any of the salt. The answer to this view is, that it was the duty of those in charge of the ship to take care that such bags of the salt as were clearly and beyond question free from signs of arsenic, and so situated that arsenic could not have reached them, and uncontaminated, in fact, by arsenic, should, during discharge, and after discharge, be kept separate from the other bags. No reasonable man on the ship could, after what had occurred, expect that there were not some bags which the loose arsenic had reached. Perhaps the separation referred to might have been effected by the officers of the ship, without notifying the consignees of the salt, by some such method as taking all the salt out of the vessel, and separating it as it came out, and not parting with the custody of any of it till all of it was taken out and separated. But, it was hardly possible that notice of the presence of arsenic on the bags should fail to reach the consignees of the salt, when bags with arsenic on them should be delivered to them; and it was the dictate of plain prudence and ordinary common sense to notify the consignees of the salt before taking any of the bags out of the vessel, in order that they might co-operate in making the proper separation, if it could be made. As it was, the neglect of the master produced the consequences which ensued, and was a gross wrong to the owners of the vessel, and the owners of the salt, and the entire community, who might very well,

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The Niagara.

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some of them, have actually consumed some of the salt and some of the arsenic with it, but for the prompt action of the consignees of the salt. It is also urged, for the claimants, that the libellants were not prejudiced by the want of notice before the discharge of any of the salt, because it must be assumed that they would have rejected all of the salt, on the ground, that, although there were no visible traces of arsenic on the outside of some of the bags, it might have penetrated through the tissue of the bags. The answer to this suggestion is, that the giving of the notice, followed by a careful separation of the bags, would have enabled the Court to determine which of the bags were free from arsenic, or to determine that none were free, or to determine that it was impossible to say which were free, or that any were free. The claimants also contend, that the course taken by the libellants, after they received the notice from the master, was calculated to create the belief that all of the salt was contaminated by arsenic, and, therefore, unfit for consumption, and that such cause destroyed the commercial value of the salt. It is shown, that the master, at the time he notified the consignees of the Ashton salt, notified, also, the consignees of the Marshall salt, and said to the latter, that he was afraid the salt was impregnated with the arsenic, and advised them not to have it used, or anything done with it, until an examination could be made. As some of the salt had been delivered, the only way to follow and give effect to the advice of the master was to notify those persons who had the salt not to use it, and, of course, the reason why must be stated—the reason given by the master—the fear that the salt was impregnated with arsenic. Therefore, the course taken by the consignees of the salt was the course suggested by the master, who best knew what had happened on the vessel, and the master's advice was sanctioned by Mr. Smith, who represented the consignees of the ship. The expert testimony of one of the principal dealers in salt in the city of New York, and which is not contradicted, is, that, on the facts proved in this case, the whole of the salt was unmerchantable, as table salt, unless there were some

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The Niagara.

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means of being satisfied that there was not arsenic enough in the salt to be injurious; that an indiscriminate delivery of the salt, with arsenic on some of the bags, would destroy the commercial character of the whole of the salt; and that he would not buy the salt, to sell it again, unless he could satisfy himself that the arsenic had not come in contact with it. In view of this, I see no ground for the suggestion made against the libellants, that they negligently or wilfully allowed the damages to be unnecessarily enhanced. I should rather be inclined to say that the master of the ship negligently caused the damages to be unnecessarily enhanced. The claimants further urge, that the libellants must have known, that, if it were once bruited abroad, that arsenic, to any extent, had been discovered on the sacks of salt, rumor would magnify the injury, and the value of the salt would practically be destroyed; that the course which they took virtually proclaimed to the community that all the salt which had come, and was coming, from the vessel was poisonous and unfit for consumption; that what the libellants ought to have done, when informed by the master of the presence of arsenic on some of the sacks, was, to invite the consignees of the ship to unite with them in having an examination of the salt and of all the circumstances of the case made by medical or chemical experts, who would have certified that all of the salt, except, perhaps, a very few sacks, might safely have been used for edible purposes, and, on such a certificate, the salt could have been sold for, at least, a better price than it brought when sold for manure; and that, on the facts of the case, the libellants cannot be allowed to urge the damage done to the commercial reputation of the salt, but can recover only such damages as they can show they have actually sustained by the incorporation of arsenic with the salt in the sacks, to such an extent as to render the salt unfit for sale. The course taken by the libellants was not only a proper one, and the only proper one, in view of the circumstances of the case, but was a course suggested by the master of the vessel. They could do nothing but recall the salt which had gone out, as those in charge

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The Niagara.

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of the ship had deprived them of any means of identifying the contaminated bags which were out of the ship. Why, if it were at all possible to separate contaminated bags from uncontaminated bags, in discharging the rest of the bags, that was not done by those in charge of the ship, does not appear. No evidence is given that they made such separation or attempted to make it. Whether the failure to do so arose from inability or from neglect, the result is the same. Under the circumstances of the case, it was the duty of the ship, as it had the means of doing so, to separate and set apart the bags which appeared externally to have come in contact with the arsenic, and to do that bag by bag, as each bag was broken out from the bulk. Then, a certificate of a chemical expert as to the rest of the bags might have been of some value. As it was, the ship drove the libellants to a chemical analysis of each bag, or a reckless sale of all the bags, with a concealment of the facts of the case. They were not bound to take either course. Those in charge of the ship destroyed the commercial value of the salt, as table salt, by the course they pursued, and the ship must respond for the damages, on the basis of the difference between the value of the salt in the market of New York as table salt, and what it in fact brought, on its sale. Let a decree to the above effect be entered in each case, with costs, with a reference to ascertain such damages."

This Court found the following facts: "The ship Niagara sailed from Liverpool for New York on the 2d of March, 1875, having on board a cargo consisting of fine table salt, soda ash and arsenic. The salt was in sacks and consisted of two lots, one branded "Ashton," containing 1,950 sacks; and the other branded "Marshall," and containing 2,850 sacks. Both lots were of superior quality and intended for edible and other domestic uses. The libellant was the owner of the Ashton brand. Both shipments were made in good order, under bills of lading in the usual form. The Ashton lot was consigned to Samuel Thompson's Nephew & Co., in New York, who were the agents for its sale in that

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The Niagara.

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market, and the Marshall lot to St. John & Avery. The ship had two decks besides her main or spar deck. The first above the lower hold was known as the orlop deck, and the other, which was next below the main deck, as between decks. The salt was all stowed in tiers across the vessel, abaft the main-mast, on the two decks and in the lower hold. The different brands were not kept separate. That stowed between decks extended from a point thirty-five feet abaft the main hatch to, or a little aft of, the first stanchion forward of the after hatch. About seven hundred sacks were stowed on the orlop deck. That in the lower hold commenced at, or a little forward of, the main-mast and extended aft to the tank. On the orlop deck and between decks it was piled so that a space varying from eighteen inches to three feet was left between it and the deck beams above. In the lower hold it was piled nearer the deck beams, but still a very considerable space was left between them and the salt. The orlop deck, aft of the main hatch, did not extend as far forward as the main-mast, and the sacks beyond it were piled from the lower hold up even with those on the orlop deck. Between decks the forward end of the sacks toward the main hatch was covered with a matting reaching from the deck and lapping over the top. It was held in place on deck with loose pieces of wood. Neither the between deck nor the orlop deck were perfectly tight, but, in some places, especially in the wings, there were cracks through which fine substances would pass. The main-mast was fifteen or sixteen feet abaft the main hatch, and around this, while the ship was working, like substances could pass. The main hatch, below the main or spar deck, was open down to the lower hold, during the entire voyage. The salt was piled in tiers, one sack above another, as close as it could be. The arsenic was pulverized and white. It was only a little coarser than flour, and could not be readily distinguished from the salt when the two were mixed. It was packed in one hundred casks, weighing from three to four hundred pounds each. It was stowed between decks, in three tiers of thirty-three casks each and one cask over; each tier

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The Niagara.

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extending entirely across the ship. The first tier commenced at the combing of the main hatch, and the three reached about five feet aft. The casks were all laid on deck, supported by pieces of wood and chocked, but there was nothing to hold them down to place, or to keep them from working fore and aft in a sea. This was bad stowage, and was entirely insufficient to keep the casks from breaking away when the ship rolled in heavy weather. The soda ash was stowed forward of the main hatch in the lower hold and the between decks. The space between decks from the arsenic to the salt was unoccupied, except by the chain boxes. On the 10th of March the ship was overtaken by a severe storm, which lasted six days, and caused her to roll and pitch very heavily. Soon after it commenced, the arsenic, on account of its bad stowage, broke away, and was thrown about on deck from side to side with very great violence. About forty of the casks had one or both the heads broken out, and the contents, in whole or in part, were scattered around on deck. Nothing could be done towards the re-stowage until after the storm was over, as it was unsafe to open the hatches, and dangerous to work below while the ship was pitching and tossing so heavily. The third day after the storm abated the arsenic was put back into the casks and the deck swept up. The heads of about twenty of the casks were replaced, but the others were so badly broken that this could not be done with them. The casks were then stowed between the chain box and the sides of the ship, some of them standing on end. They were blocked up as well as they could be with wood. On the 24th of March another storm came on and the arsenic again broke adrift. This time about the same number of casks were stove, and the contents scattered about the deck. The largest part, however, was found in the wings. Four of the casks were so badly broken that they could not be again used. When the gale abated, all the arsenic that the casks would hold was put back, and the remainder swept into a pile on deck, a little abaft the main-mast and between that and the side of the ship, and covered with matting kept in place

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The Niagara.

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by pieces of wood. Ten or twelve of the casks could not be headed up in one end. The casks were again stowed, some of them standing on end, between the chain box and the sides of the ship. There was nothing between the loose arsenic in the pile and the deck. The vessel arrived in New York, without having experienced any further heavy weather, on the 4th of April. No report whatever was then made to the consignees of the salt, of what had occurred on the voyage. The soda ash and arsenic were discharged from the forward and main hatches before any of the salt was taken out. New casks were procured to replace those that had been broken up, and the others were repaired. After this, the discharge of the salt was commenced from the after hatch. All of the Ashton salt, and a part of the Marshall, had been sold to arrive. The delivery commenced on the 16th of April, and the salt was taken first from the orlop deck and between decks, and then from the lower hold. Seven hundred and seventy-five sacks of the Marshall salt were put out on the 16th, and five hundred on the 17th, all of which came from the after hatch. On the 17th, also, a lighter came alongside for another load of the Marshall salt. About two hundred sacks, for this load, were taken out of the after hatch, and, no more of the Marshall brand being accessible from that hatch, the main hatch was opened, and the remainder of a load of five hundred sacks taken from there. As the sacks were coming out of the main hatch, the captain of the lighter discovered on some of them a white powder and objected to receipting in good order. This powder proved to be arsenic. The mate, who was superintending the getting out of the cargo, at once reported what had been discovered, to the captain. This was Saturday afternoon, and the captain, suspecting that the powder was arsenic, went to the office of the ship's consignees, to consult with them. They had left, however, before he arrived and nothing more was done until Monday morning. The lighter finished taking on her load that night. About ten o'clock Monday morning the captain had an interview with his consignees, and, upon their advice, he went to the

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The Niagara.

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consignees of the salt and told them what had occurred, at the same time saying he found some of the salt had become impregnated with the arsenic. One of the consignees of the salt went at once to the ship, to stop further deliveries. At that time, 1,775 sacks of the Marshall brand had been delivered and had actually gone into store. This included the two or three hundred sacks that had been taken out of the main hatch. One hundred and thirty sacks of the Ashton brand, taken out of the main hatch, had been delivered upon drays, and three hundred had been loaded on a lighter alongside. All, or nearly all, save the three hundred sacks on the lighter, had actually gone into store. No attempt was made to keep that which had arsenic upon it separate from the rest, but it was thrown together indiscriminately. After the delivery had been stopped, an expert was employed by the consignees of the salt, to make a thorough examination of the vessel and such of the cargo as remained on board. Arsenic, in the form of dust, was found pretty generally diffused throughout the ship, from the main hatch aft about twenty-five feet. It was found on projecting timbers, on the floor, in some places, on rough places in the ceiling of the ship, and in the matting. It was found on very many of the sacks, in appreciable quantities. The sacks in the wings and around the main-mast were the most affected. In some instances it stood half an inch thick on the sacks. Some of the sacks were only touched on the ends. On some it extended several inches, and on others the whole upper half was covered. The point furthest aft, where any arsenic was found, was twelve feet beyond the fifth tier of sacks, in a piece of matting used for covering, and on the sacks as far as the sixth tier. The tiers beyond the sixth had mostly been removed. It had evidently sifted through the cracks in the decks and the opening around the mast. One of the sacks was taken out and opened. Samples were taken from the outside and the middle of this package, and analyzed. In all arsenic was found in appreciable quantities. On the 23d of April the expert reported to the consignees as follows: "70 Union Place, April 23d, 1875.

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The Niagara.

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Messrs. Webster & St. John: Gentlemen: The day I accompanied you (April 21st, 1875) to visit the ship Niagara, Pier 47, East River, I obtained dust brushed from sacks of salt stowed near the main hatch in the lower deck of said vessel; also, from sacks in the orlop deck; also, from near the main-mast; also, a white powder from the after part of the combings of the main hatch; also, a piece of matting from around the lowest part of the main-mast; also, another piece of matting from the starboard wing of the ship in the lower hold, said matting being used to protect the bags from being soiled. On submitting these to chemical analysis I found arsenic in all of them. The matting was thoroughly impregnated with the powdered arsenic. It had sifted through every portion of it. On Thursday, the 22d inst., I received at the City College, from John Welsh, truckman of Messrs. St. John & Avery, a sack of "Marshall" salt, which he stated he saw taken out of the middle hatch of the Niagara by the mate of the vessel, assisted by three men, and in the presence of Mr. Collins, salesman of the before-mentioned firm. I found the sack of salt covered, in great part, with a white powder, which, on analysis, proved to be arsenic. It was so liberally distributed that the slightest touch caused its removal. I carefully cut open the sack, laid back the cut sides, and removed a portion of the salt from different parts. I dissolved the samples thus obtained in water, and, by various chemical tests, obtained arsenic from the salt, thus demonstrating that, notwithstanding the compact texture of the sack, the arsenic had sifted through. From these examinations, I am of the opinion, 1st. That arsenic, in the form of a powder, has been distributed through the holds of the ship Niagara. 2d. That the white powder on many of the sacks of salt is arsenic. 3d. That the arsenic has sifted through the tissue of such sacks, and has contaminated the salt contained therein. 4th. That, in consequence of this poisonous admixture, said salt should not be used for edible purposes, as, in the household, the salting of butter, the preservation of meat, &c., &c. 5th. That, since the arsenical powder covers the sacks to so large an extent,

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The Niagara.

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and is so easily removed, said sacks should not be conveyed with or stored where articles used for food may be contaminated by the fine arsenical dust necessarily discharged in ordinary handling of the sacks. 6th. That, from the fact of the discovery of arsenic on the lower part of the main-mast, and in the matting covering the same, and in the matting obtained from one of the wings of the vessel, in the lower hold, and in the dust from some of the sacks of salt there stowed, this poison has gained access to this part of the ship. 7th. That, from the discovery of arsenic in the dustings of sacks of salt near the main hatch, in the lower hold of the ship, though less in amount than found on those in the upper hold, still said sacks and their contents are not free from contamination. 8th. That, inasmuch as I have learned from one of the officers of the ship Niagara, that about three thousand sacks of salt have been removed from the vessel, in my opinion, those powdered with arsenic may have contaminated others comparatively free therefrom. Hence, without a chemical analysis of the contents of each sack, it would be impossible to predicate which are free from this poison. 9. That many sacks of salt in the hold of the vessel on the 21st of April are probably uncontaminated, but, in my opinion, it would be wise, as a matter of precaution, not to use the said salt as a condiment, or in any articles of diet. Furthermore, I have learned from the captain of the Niagara that one hundred kegs of arsenic were stowed near the main hatch in the upper hold of said ship, and that, during two severe storms, on the passage from Liverpool, nearly the half of said kegs were broken, and their poisonous contents scattered, and, as I have found said arsenic disseminated, in a pulverulent form, in the holds of the vessel, even passing in considerable quantities between the main-mast and the deck, and through crevices in the deck to the lower holds, and as it is known that from one to five grains of arsenic may produce fatal results in the human being, from my experience as a toxicologist, I am of the opinion that all the salt imported by the ship Niagara, during her last voyage from Liverpool, should be used solely for pur-

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The Niagara.

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poses where life would not be endangered. I have the honor to remain your obt. servt., R. Ogden Doremus." The expert, as a witness in the cause, substantially reiterated the statements in his report. On the receipt of this report, the consignees declined receiving any more of the salt, and stopped the sale of that which had been delivered. A few days afterwards, the agents of the ship called upon Charles F. Chandler, Professor of Chemistry in Columbia College and President of the Board of Health, to make an examination of the ship and the cargo on board. He carefully inspected the vessel and took samples, which were analyzed for him by the chemist of the Board of Health. He also selected one of the sacks for examination, and parts of its contents were analyzed. Arsenic was found in the salt, but he was of the opinion that there was not danger of harm coming from the use of the salt, and, therefore, as a member of the Board of Health, did not condemn it. When these examinations were made, nearly all of the salt had been removed from the orlop deck and the between decks, and many of the tiers in the lower hold had been broken up, in selecting out the different brands to fill the various delivery orders, and there was no way of determining the actual condition of the sacks which had been discharged, except by chemical analysis, the expense of which would be more than the salt would be worth afterwards. Soon after the last report of the examiners was made, the remainder of the salt was discharged and placed in store, under an amicable arrangement, for that purpose, between the parties. All that which had been before delivered was collected and placed in the same store. It remained there for something more than a year, when, under another arrangement between the parties, it was sold for fertilizing purposes. The loss on the Ashton salt, by this sale, it was agreed between the parties, amounted, at the date of the decree below, January 3d, 1878, to five thousand three hundred and eight <sup>08</sup>/<sub>100</sub> dollars. After the salt had been placed in store, under the arrangement between the parties, the libellant refused to permit the re-

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The Niagara.

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spondents to put it on the market for sale, to go into consumption."

*John E. Parsons*, for the libellant.

*Henry Nicoll*, for the claimants.

WAITE, Ch. J. It was conceded, upon the argument in this Court, that the arsenic was badly stowed, and that the ship was liable to the extent it could be shown the salt had been actually impregnated with the poison. The whole controversy here has been in respect to the amount of damages. On the part of the ship, it is claimed that the sacks which had come in contact with the arsenic should have been separated from those that had not, and that the good should have been sold as sound, the others only being condemned. Undoubtedly, a very large part of the cargo was free from taint when it arrived. If a careful inspection had then been made, and pains taken to keep such of the sacks as had been exposed to contamination from such as had not, it is clear that a separation might have been made of the good from the bad, which would have ensured safety. But, unfortunately, this was not done. Whether designedly or not, the consignees were kept in ignorance of what had occurred on the voyage, and an inspection of the ship delayed by her officers and agents, until bulk had been broken, and a large number of the impregnated sacks mixed with others, that were probably sound, in such a way that it was impossible to distinguish the one from the other. Confessedly, all the sacks of the Marshall brand which came out of the main hatch on the 17th, and all the sacks of the Ashton brand which came out on the 19th, were taken from around the main-mast and from the other places that had been most exposed to the poison. No attempt whatever was made on the 17th to confine the arsenic to the places in which it then was. In fact, no attention at all was paid to it until complaint came from the lighterman. Even then notice could not have been given that the powder

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The Niagara.

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which was the cause of the complaint was arsenic, for, the delivery clerk, who was sent by the consignees of the ship to check out the cargo, was not made acquainted with the facts until Monday, when the consignees of the salt came to stop further deliveries. It was then clearly too late to make an absolutely reliable separation. The evidence shows, beyond all question, that the poison had become mixed with the salt in some of the sacks, in quantities sufficient to endanger life, and that, after the dust had been knocked or brushed off the outside of the sack, as it easily could be, there was no way of telling what had become impregnated and what had not, except by an expensive chemical analysis. When, therefore, the consignees of the salt became aware of the dangers to which it had been exposed and stopped further deliveries, the commercial character of their property, as a superior article of fine salt for the table and other domestic uses, was necessarily gone. The consignees of the arsenic had told the consignees of the salt that there was arsenic enough scattered about the ship, during the voyage, "to poison a nation," and from two to three hundred sacks, that were known to have been exposed to contact with the poison, had been mingled indiscriminately with fifteen hundred, or thereabouts, which might have been sound, without any way of distinguishing the good from the bad. The tiers, as they had been piled in the ship, were broken up, and the poisonous dust, which, in some places, stood half an inch thick upon the outside of the sacks, had been suffered to fall where it would, without any attempt whatever at confinement. Clearly, under such circumstances, there was no way of ensuring absolute safety, except to condemn the whole. It matters not that persons might have been found, who, tempted by the hope of gain, would pay for the property more than it was worth for fertilizing purposes, and run the risk of selling it for domestic uses. To have exposed a single sack to sale for such uses would be a gross wrong, unless it was known to be entirely free from danger. The public safety required that no risks should be taken. A mistake could not be tolerated, and, as the ship

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The Osseo.—The Sandy Hook.

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alone was at fault for putting the property in such a condition that absolute certainty in this particular was not attainable, it is but just that she should be charged with the difference between its value, according to the commercial character to which it had been reduced by her gross and palpable neglect, and that which it originally had. Human life is not to be needlessly exposed to danger.

But, it is useless to proceed further. This whole subject was carefully considered by the learned District Judge, and I agree fully with the views expressed in his elaborate opinion filed below. Let a decree be prepared in favor of the libellant, for the amount of the decree below, with interest on the actual amount of the loss, from the date of that decree until the present time, and also for the costs in both Courts.

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THE OSSEO.—THE SANDY HOOK.

A sailing vessel having the wind free and a sailing vessel close-hauled collided. They were approaching each other very nearly end on, on courses which crossed not far from the place of collision. It being the duty of the former vessel to keep out of the way, she was held in fault for attempting to pass so close to the latter vessel, that a mistake of the latter vessel in luffing caused the collision. The latter vessel was held in fault for luffing, because she had no sufficient lookout, although the luffing was just at the moment of the collision.

(Before WAITE, Ch. J., Southern District of New York, July 31st, 1879.)

THESE were cross libels filed in the District Court, *in rem*, in Admiralty. The District Court decreed against the Sandy Hook, and dismissed the libel against the Osseo. (8 *Benedict*, 518.) The Sandy Hook appealed to this Court, in both suits. This Court found the following facts: "Shortly after eight o'clock in the evening of March 11th, 1875, a collision occurred in Long Island Sound, a little to the northward of

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The Osseo.—The Sandy Hook.

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Stratford light boat, between the schooners Osseo and Sandy Hook. The Sandy Hook was of about two hundred tons burden, loaded with oysters, and bound from New York to New Haven. The Osseo had a carrying capacity of a little less than two hundred tons. She was deeply loaded with lath, and bound to New York. A part of her cargo was stowed on deck, about six feet high, and extending forward a little beyond the fore-mast. It came close up to the booms; and a person standing on the sides could not see under the sails, except at the bow and stern, where the deck was left clear. She was a keel vessel, without a centre-board, very crooked, and loaded so deep that the water came on deck midships. The wind was south, or a little east of south. The Sandy Hook was sailing east by north, half north, with the wind two points or more free. The Osseo was close-hauled, and steering by the wind, south-west by west, a little west. Both vessels had their regulation lights set and burning. The Sandy Hook had the wind on her starboard side, and the Osseo had it on her port side. The Sandy Hook was making about seven knots an hour, and the Osseo three or three and a half. The red light of the Osseo was seen from the Sandy Hook, a little off the port bow, when the vessels were a mile or more apart. The mate was on the lookout, and the light duly reported by him. The captain at once, on hearing the report, came on deck and took the wheel. The Sandy Hook kept steadily on her course, without any change, until just at the moment of the collision, when she luffed a little, to ease the blow. The lights on the Sandy Hook were not seen at all from the Osseo. Not many minutes before the collision, the watch on the Osseo was changed, her captain and one man going below, and the mate and another man coming on deck. There were only four men on board to stand the watches. The man coming on deck took the wheel from the captain, with instructions to steer by the wind and keep as close as he could. The mate went to the lee side, and walked on the lath between the two masts, going no further forward than the fore-mast. The man at the wheel could not see at all to the leeward. The mate, while

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The Osseo.—The Sandy Hook.

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walking on the lath, noticed that the sails were shaking. He at once went aft, upon the windward side, and ordered the man at the wheel to keep them full. Having given this order, he looked at the compass, and then, jumping down on deck, looked under the mainsail, when, for the first time, he discovered the Sandy Hook close upon him. He ran forward and almost immediately hailed the approaching schooner to keep off. Just then the Osseo luffed, and the two vessels came together, the Osseo striking the Sandy Hook near the cathead, on the port side. The force of the blow was such as to cut into the Sandy Hook somewhat and to injure the stem of the Osseo. The Sandy Hook kept on her course, and swung the Osseo around, so that she headed eastward. In swinging around, the jib-boom of the Osseo was broken, and the vessels separated. The Sandy Hook kept on to New Haven without stopping. The Osseo, after clearing away the wreck, put about, and went to New York. Both vessels were somewhat injured, but not enough to delay materially the voyage of either. Up to the very moment of the collision there was no one on the deck of the Osseo except the mate and the man at the wheel. There was nothing to prevent the Sandy Hook from keeping far enough away from the Osseo to avoid all danger of collision."

*Richard H. Huntley*, for the Sandy Hook.

*Robert D. Benedict*, for the Osseo.

WARRE, Ch. J. There is much conflicting testimony in these cases, but a few controlling facts are substantially conceded on both sides. Thus, it is admitted that the Sandy Hook was sailing somewhat free, while the Osseo was close-hauled. This made it the duty of the Osseo to hold her course, and of the Sandy Hook to keep out of the way. (*Rev. Stat.*, sec. 4,233, *Rules* 17, 23.) The two vessels were approaching each other very nearly end on, upon courses which crossed not far from the place of collision. The Osseo was

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The Osseo.—The Sandy Hook.

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first discovered a little over the port bow, and to the leeward, of the Sandy Hook. Her red light only was seen until just before the collision, though, it is evident, from the testimony, that it drew more and more over the bow, as the vessels came nearer together. It is not claimed that the Osseo changed her course materially until she luffed, and as, when the vessels came together, she was still swinging on her helm, and her sails were shaking, it is evident that the Sandy Hook held her course until she was too near for absolute safety. As it was her duty to keep out of the way, and there was plenty of room for her to do so, it was a fault for her to attempt to pass so close that the mere luffing of the Osseo would produce a collision.

That the Osseo did luff just at the moment of the collision is, to my mind, certain. The original courses of the two vessels varied only about one point, and, if the collision had occurred where they crossed, it would have been end on, or nearly so. The Osseo was a keel vessel, deep in the water. Her own witnesses say her deck was under water midships. Had the vessels come together in that way, the concussion would have been very heavy, as the combined speed was, at least, ten miles an hour. It is difficult to believe, that, under such circumstances, the Sandy Hook could turn the bow of the Osseo around from west to east, break the jib-boom, clear herself from the entanglement of the collision, and keep on her voyage, without stopping or materially changing her course, as all agree she did. If, however, the Osseo did luff, and was heading well toward the south, when the vessels actually came together, all that subsequently occurred is easily explained. The momentum of the Sandy Hook, at the speed she was going, would be quite sufficient to carry the bow of the Osseo with her until the jib-boom broke, when there would be nothing to prevent her going off free.

Undoubtedly, this luff of the Osseo occurred when those on board supposed the danger was imminent, and when, under ordinary circumstances, it would not have been a fault; but, as it is apparent, from the testimony, that she had no

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The Osseo.—The Sandy Hook.

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sufficient lookout, and the mistake would not have been made if the Sandy Hook had been seen in time, that which would otherwise have been only an error connects itself with the fault of a want of lookout, and places the vessel in the wrong. The mate was the only person on deck who could act as lookout, but he was attending to the navigation of the vessel, and, besides, was not at his proper place. The evidence satisfies me that the Sandy Hook had her lights set and burning, and it is impossible to believe, that, if the mate had taken his place on deck at or near the bow, and had given attention to his business, he would not have seen the approaching vessel in time to have prevented the erroneous movement which was, as I think, the immediate cause of the collision. Had he noticed the Sandy Hook as she came up, he would have seen, that, in all probability, if he kept his course, as it was his duty to do, the vessels would go clear, and, at any rate, that to luff was the very worst thing to be done. I am, therefore, clearly of the opinion, that the Osseo was guilty of a fault which directly contributed to the collision.

Both vessels being at fault, the damages must be apportioned, and, as cross libels have been filed, the costs, in both Courts, should, under the rule laid down by the Circuit Judge of this Circuit, in *Vanderbilt v. Reynolds*, (*ante*, p. 80,) be divided equally. A decree may be prepared accordingly, and a reference ordered to ascertain the amount of damages sustained by the Sandy Hook and make the apportionment.

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The D. S. Gregory.

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## THE D. S. GREGORY.

In this case, two steam ferry-boats collided in a fog. The one which had the other on her port hand was held solely in fault, she having kept on while the other had come to a stand still, each having heard the blasts of the steam whistle from the other.

The responsibility of keeping out of the way in a fog is upon both of two approaching steam vessels.

(Before WAITE, Ch. J., Southern District of New York, July 31st, 1879.)

THIS was a libel *in rem*, filed in the District Court, in Admiralty. That Court decreed for the libellant, (7 *Benedict*, 499,) and the claimant appealed to this Court. The following facts were found by this Court: "About seven o'clock in the morning of January 3d, 1873, a collision occurred, near the middle of the Hudson River, opposite New York, between the steam ferry-boat Pavonia, owned by the libellant, and the steam ferry-boat D. S. Gregory. The river is about one mile wide at this point. An unusually dense fog prevailed at the time. There was no wind. The tide was the first of the ebb. Both vessels were side-wheel steamers, employed on ferries across the Hudson River between New York and New Jersey, and well known to each other. The Pavonia connected with the Erie Railroad, and the D. S. Gregory with the Pennsylvania Railroad. The Pavonia was on one of her regular trips from the foot of Chambers Street, New York, to her slip in Pavonia, on the New Jersey side, and the D. S. Gregory was on one of her regular trips between Desbrosses Street, New York, and Montgomery Street, Jersey City. As Desbrosses Street was higher up the river than Chambers Street, and Pavonia higher up than Montgomery Street, Jersey City, the courses of the two boats crossed each other. The regular course of the Pavonia, after leaving her slip, was about north-west, and that of the D. S. Gregory south-west, or, south-west by west. This brought

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The D. S. Gregory.

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the point of crossing near the middle of the river. The full speed of the Pavonia was about twelve miles an hour, and that of the D. S. Gregory scant eleven. Both boats were in charge of experienced and competent pilots, and had their lights properly set and burning. The D. S. Gregory had two lookouts performing their duty, and both standing on the upper deck, one on each side of the pilot house. The Pavonia had one lookout on the upper deck, performing his duty and standing near the pilot house. Another lookout was on the deck below. The Pavonia started out of her slip at full speed, but, as soon as she got outside, slowed down to half speed and headed on her regular compass course. She sounded her fog whistle at proper intervals. Soon after she got out, she heard a whistle off her starboard hand, which she recognized as that of the D. S. Gregory, or one of the other Desbrosses Street boats. After this she kept on for a little time at half speed, but, as the sound from the whistle of the D. S. Gregory came nearer, concluded to stop and let that boat go by ahead. Accordingly, her bell was rung to stop, and the order was promptly obeyed. She still continued to blow her fog whistles, but, after her engine had been stopped a little time, hearing the noise of the wheels of the D. S. Gregory from a direction which indicated danger of collision, she sounded the alarm whistle and rang her bell to back. Almost immediately afterwards the D. S. Gregory appeared through the fog and ran into her on the starboard side, just forward of the starboard wheel. The bell was rung to back and the alarm whistle sounded before the D. S. Gregory, or her lights, came in sight. The forward part of the Gregory passed under the guards of the Pavonia and knocked a large hole in her side. The wheels of the Pavonia made four turns back before the boats came together, but she had not acquired much, if any, backward motion. The D. S. Gregory, when she left her slip, slowed down to half speed and took her regular course by compass for her New Jersey landing. She sounded her own fog whistles, and heard those from the Pavonia, and recognized them as coming from a boat passing from New

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The D. S. Gregory.

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York to Pavonia, on that ferry. She kept her course at half speed, however, until she saw the Pavonia looming up before her out of the fog, when she rang her bells to stop and back, but, before her headway was materially affected, the collision took place. Both the Pavonia and the D. S. Gregory were respectively in places, on their courses, where they might properly have been looked for if there had been no fog. The damage done to the Pavonia by the collision amounted to \$3,812 54, at the date of the decree below."

*William D. Shipman*, for the libellant.

*Welcome R. Beebe*, for the claimant.

WAITE, Ch. J. While I cannot say I am as certain as the District Judge seems to have been that the Pavonia was entirely free from fault, I have, on the whole, come to the conclusion that the preponderance of testimony is that way. My doubt has been as to whether she did not keep on at half speed too long, but it is clearly proven that she did stop her engine some time before the Gregory appeared in sight, and that she rang her bell to back as soon as the sound of approaching wheels indicated special danger. She did, with the simple stoppage of her engine, come almost, if not quite, to a stand still, before the point was reached on which the courses crossed. This showed caution and special attention to moderate speed. Had the Gregory done as much, it is almost certain a damaging collision could not have occurred. Instead of that, she seems to have assumed, that, because the Pavonia was on her port hand, she had the right of way, and might keep her course and speed with impunity. In this, I think, she was in fault.

It is true, the statutory sailing rules provide, that, "if two vessels under steam are crossing as as to involve risk of collision, the vessel which has the other on her own starboard side, shall keep out of the way of the other," (*Rev. Stat.*, sec. 4,233, *Rule 19*,) and that, in such case, "the other shall keep

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The D. S. Gregory.

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her course," (*Rule 23*,) having regard "to any special circumstances which may exist in any particular case, rendering a departure \* \* \* necessary, in order to avoid immediate danger," (*Rule 24*.) This evidently has reference specially to cases where the vessels can be seen from each other and their movements directed accordingly; and so the supervising inspectors must have understood, when, under the authority (§§ 23 and 29) of the Act of February 28th, 1871, (16 *U. S. Stat. at Large*, 449, 450, now *Rev. Stat.*, *secs.* 4,405 and 4,412,) they adopted their Rule IV, which is as follows: "When steamers are running in a fog or thick weather, it shall be the duty of the pilot to cause a long blast of the steam whistle to be sounded, at intervals not exceeding one minute, and no steamer shall, in any case, be justified in coming in collision with another vessel if it be possible to avoid it." To this must be added statutory Rule 21, which provides, that "every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam vessel shall, when in a fog, go at a moderate speed;" and, taking all together, it seems to me clear, that the responsibility of keeping out of the way in a fog is thrown upon both of two approaching steam vessels. The reason is obvious. In the midst of a fog, sound takes the place of sight, as the means of ascertaining the position of approaching vessels; and as, for such purposes, sound is more uncertain than sight, the greatest caution is required on all sides. Hence it has been established, that, under such circumstances, steamers shall take no risks. They are not to be justified in colliding with *any* other vessel in a fog. Having complete control over their own movements, they can, if they will, come to an understanding as to the manner in which they shall pass each other, before any serious collision can occur. It may cause some inconvenience to those who are in haste, but it will be more likely to ensure safety.

Here, each boat knew of the close proximity of the other, and their well-understood crossing courses made a collision

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The D. S. Gregory.

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possible. Each heard and recognized the signals of the other. It was easy to communicate by signals that experienced pilots would readily interpret. By moving slowly and cautiously, there was no great difficulty in feeling their way, until there was a perfect understanding as to what each should do. All it needed was to act in accordance with the spirit of Rule III of the supervising inspectors, framed for another purpose, and "both slow to a speed barely sufficient for steerage way, until the proper signals had been given, answered and understood." This the Pavonia attempted to do, when she stopped and finally backed her engine. So as not to run any risk of being confused as to her bearings, she kept her course, while she held on to let the Gregory by. If she could have seen, she might have steered out of the way. In the fog, however, it was clearly easier to retain the knowledge of where she was by holding on, rather than changing, her course. Had the Gregory been equally cautious and watchful, I cannot but think no damage would have been done.

The "rule of the road," to "keep to the right," always yields to a contrary agreement between the parties. Sometimes, safety requires that this agreement should be made before dangerous proximity is reached. The rule contemplates certainty as to position and movements. If there is doubt, an attempt should always be made to arrive at a mutual understanding of what is to be done. Especially should this be the case when vessels are navigating a crowded harbor in a fog.

The Pavonia was not "laying by" or "drifting," within the meaning of those terms in Rule X of the supervising inspectors, and, consequently, she was not required to use the special signals contemplated by that Rule. She was simply holding on to let the Gregory go by, and, therefore, only bound to give the usual fog signals to indicate her locality.

The damages below, as agreed upon, included interest to the date of the decree. The libellant is entitled to recover, in this Court, the amount allowed below, with interest, from the date of that decree, on the actual amount of damages as stipulated, not including any interest as calculated below.

An entry may be prepared accordingly.

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The United States v. Frerichs.

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THE UNITED STATES, PLAINTIFF IN ERROR

vs.

FREDERICK FRERICHS, DEFENDANT IN ERROR.

Under § 3,247 of the Revised Statutes, which enacts that every person who, "making or keeping mash, wort or wash, has, also, in his possession or use a still, shall be regarded as a distiller," to make one in possession of a still a distiller, because he keeps mash, wort or wash, the mash, wort or wash kept must be such as will produce spirits, on distillation.

Whether an order of the District Court refusing a certificate of reasonable cause of seizure, under § 970 of the Revised Statutes, can be reversed by the Circuit Court, on a writ of error, *quere*.

(Before WAITE, Ch. J., Southern District of New York, July 21st, 1879.)

WAITE, Ch. J. The issue made below was, as to whether the claimant was a distiller of spirits, within the meaning of section 3,247 of the Revised Statutes; and the first error assigned here is upon the order of the Court directing a verdict for the claimant, at the close of the evidence on the part of the Government. That section of the Statutes is as follows: "Every person who produces distilled spirits, or who brews or makes mash, wort or wash fit for distillation or for the production of spirits, or who, by any process of evaporation, separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort or wash, has, also, in his possession or use a still, shall be regarded as a distiller."

It cannot be seriously contended, that the evidence was sufficient to warrant a jury in finding that the claimant actually produced distilled spirits, or that he brewed or made mash, wort or wash fit for distillation or the production of spirits, or that he actually separated alcoholic spirit from any fermented substances. All that can be insisted upon by the Government is, that there was evidence tending to prove that

he had in his possession or use a still, and that he *kept* mash, wort or wash, within the meaning of this statute. The still he had in his possession was put up for the manufacture of acetic acid, and was duly registered as such. About this there is no dispute. To make one in possession of a still a distiller, because he *keeps* mash, wort or wash, the mash, wort or wash kept must be such as will produce spirits, on distillation. The evidence in this case was clear, to the effect that the substance complained of would not produce distilled spirits. It was intended for the manufacture of vinegar, and, when distilled, did not, and could not, yield spirits. It had already gone through such a process of fermentation in another place, where there was no still, as to render it impossible to convert it, or any part of it, into spirits, by distillation or any process of evaporation. This was the uncontradicted testimony of the only witness examined on that subject. The process through which it was to be put by the claimant was only for the purpose of cleansing it of impurities, and thus fitting it for use in the manufacture of vinegar. It was, in fact, a weak acetic acid, mixed with foreign substances, which must be removed before it could be converted into marketable vinegar. One who produces a substance which can be converted into vinegar by the use of a smaller quantity of spirits than is ordinarily employed, is not, necessarily, a distiller of spirits. To become such in law, he must actually produce spirits, or keep with the still he uses that which will produce them. Such was not the case here. Had the jury found, from the evidence, a verdict against the claimant, it would clearly have been the duty of the Court, on motion, to set the verdict aside and grant a new trial. Under such circumstances, it was not error for this Court to direct a verdict in favor of the claimant.

If an order of the District Court refusing a certificate of reasonable cause of seizure, under the provisions of section 970 of the Revised Statutes, can be reversed by the Circuit Court, upon a writ of error, it ought not to be done except in a clear case. The evidence which has been embodied in

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Livingston v. The Proprietors of the Ore Bed in Salisbury.

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this bill of exceptions is not such as to satisfy me that any error was committed in this particular.

The judgment of the District Court is affirmed.

*Edward B. Hill, (Assistant District Attorney,)* for the plaintiff in error.

*Edward Salomon,* for the defendant in error.

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HERMAN T. LIVINGSTON

v8.

THE PROPRIETORS OF THE ORE BED IN SALISBURY. IN EQUITY.

L. filed a bill in equity against a corporation, to compel it to issue to him 50 shares of its stock, representing one-eighth of all its shares. The stock grew out of a bed of iron ore. L. claimed under a will made by H., who died in 1872. H. had enjoyed no benefit from the property for 50 years before he died. No demand was made for the stock till L. made it, in 1874. Other persons had openly enjoyed and claimed title to the same 50 shares from 1847. H. was, during the 50 years, in a position to know that his property, if any, was claimed and enjoyed by others : *Held*, that, because of acquiescence and laches and the staleness of the claim, L. could not recover.

(Before SHIPMAN, J., Connecticut, August 1st, 1879.)

SHIPMAN, J. This is a bill in equity to compel the defendant, a corporation established by the General Assembly of Connecticut, to issue to the plaintiff, a resident and citizen of the State of New York, fifty shares of the stock of said corporation, which are alleged to belong to the plaintiff, and to pay the amount of the dividends which may have become due upon said stock, or for such other and further relief as the nature of the circumstances may require, and as may be

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*Livingston v. The Proprietors of the Ore Bed in Salisbury.*

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just and equitable. In 1735, the Governor and Company of the Colony of Connecticut, granted in fee to John Ashley an undivided fourth, and to each one of six other persons an undivided eighth, of a tract of land containing one hundred acres, situated in the town of Salisbury, and subsequently known as the "Ore Bed Ground," or the "Salisbury Ore Bed," and which contained valuable iron ore. In 1784, the proprietors of this tract were incorporated by the General Assembly of this State under the name of "the Proprietors of the Ore Bed in Salisbury." The powers conferred were, in general. "to adopt, ordain and make such rules, regulations and by-laws as they shall judge reasonable and right for employing miners to raise said ore and promote the increase thereof, to appoint a committee or agent to order, direct and superintend the same, according to such rules and orders as he or they shall receive from the proprietors in their said annual meeting, and that such committee or agent shall have, and hereby are vested with, full power and authority, in his or their name, for and in behalf of the proprietors of said ore bed, to sue and prosecute to final judgment and execution any person or persons, whether proprietors or others, who shall, without his or their consent, dig or raise any ore in said bed, contrary to the rules or by-laws so adopted by said proprietors, or shall, in any wise, trespass upon the said common interest of the proprietors, the avails whereof they or he shall hold for the use and benefit of the common interest, and all cost and expenses attending the same shall be by such committee or agent paid out of the common treasury of said proprietors," and "to make and ordain all and every such rules, ordinances and by-laws concerning their common interest and the management of the same, that they shall judge necessary, so as the same be not repugnant to the general law of this State." About 1790, Robert Livingston, the last proprietor of the Manor of Livingston, died seized and possessed in his own right, in fee, of an undivided four-eighths of said ore bed. He was, also, the owner of the Ancram Furnace, in the State of New York. This furnace was about five miles

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Livingston v. The Proprietors of the Ore Bed in Salisbury.

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from the ore bed, and was supplied with ore from his share of the bed. By his last will, duly proved and approved December 8th, 1790, before the Surrogate's Court for the County of Columbia, in the State of New York, his sons, Walter, Robert Cambridge, Henry, (subsequently known as "General Henry,") and John were made residuary devisees of all the real estate not specifically devised. His interest in the ore bed was a part of the residuary devise. He also devised to said four sons a large part of the Manor of Livingston. After his father's death, Walter conveyed his estate in the part of the Manor so devised, to his brother Henry. This part having been divided into four great lots, numbered one to four inclusive, by a deed of partition between Robert, John and Henry, dated October 4th, 1792, Robert took title to No. 2, John to No. 4, and Henry to Nos. 1 and 3. The Ancram Furnace was in lot No. 3. Walter also conveyed his one-eighth of the ore bed to Henry, by deed of October 6th, 1792. General Henry, upon the organization of the corporation in 1784, was appointed its agent, and so continued until his death in 1823. Each proprietor was in the habit of receiving whatever ore he desired for his own purposes, of which an account was kept by an officer called "clerk of the hill;" and ore was sold to non-proprietors. Annually, or oftener, the accounts were adjusted and settled, and the amount due to each proprietor, by way of dividend or net profits, was paid. It is apparent, from the treasurer's accounts, which are preserved to the year 1802, that, up to that time, General Henry received the dividends or profits upon four-eighths of the ore bed business; and it is not doubted that he paid one-eighth to Robert Cambridge, or to his children. The book containing the treasurer's accounts from 1802 to 1835, has been lost, but memoranda of dividends, and drafts of accounts, for parts of eleven years, between 1820 and 1835, have been preserved. It does not appear when this payment of four-eighths to General Henry ceased, or when the payment of one-eighth directly to Robert's children commenced; but, in the years 1820 and 1821, General Henry received three-eighths, and thereafter the

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Livingston v. The Proprietors of the Ore Bed in Salisbury.

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payments to him and to his devisee, and to his devisee's devisee, seem to have been, uniformly, the last named fractional part, while Robert's representatives took directly one-eighth. General Henry died in 1823, unmarried, and, by his last will, devised in fee to his nephew, Henry Livingston, afterwards called Henry of Claverack, son of John Livingston, "all my right, interest and estate of and in the ore bed and its appurtenances, situated in the town of Salisbury," and also devised to him one undivided half of great lot No. 3. John Livingston had died in October, 1822, aged 74, and, by his will, it appears that his son's inheritance of a share in his bachelor uncle's estate was not unexpected. John's will recites, that, "Whereas, my brother Henry Livingston has frequently and solemnly engaged that he will, by his last will and testament, or otherwise, give and devise to my said son Henry, his heirs and assigns, the one equal moiety of all that portion of the Manor of Livingston, \* \* \* known and distinguished by the name of great lot No. 3, now," &c. General Henry and John lived within five miles of each other, and were reputed to be on very intimate terms. John's residuary devisee was his son Herman, who was thirty years old when his father died. Henry of Claverack was immediately appointed agent of the corporation, in place of his deceased uncle, and so continued until his death in the year 1828. He devised to his son Henry, (called "Dock,") the Ancram property, and all his right in the ore bed. The widow of Henry of Claverack claimed her dower in his estate, and, upon her petition, the Court of Probate for the district of Sharon set out to her a life estate in one undivided third part of three undivided eighth parts of the ore bed. Henry Livingston, (called "Dock,") and his wife conveyed, in 1843, to his brother Herman Livingston, and to his brothers-in-law, Alonzo Bogardus and James S. Talbot, the Ancram property, and his right and title in the ore bed. On March 5th, 1844, these three grantees, by a deed reciting, that, whereas, "General Henry Livingston, of the town of \* \* \* was owner of three equal undivided eighth parts

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*Livingston v. The Proprietors of the Ore Bed in Salisbury.*

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of the Salisbury ore bed, situate in the State of Connecticut," and by his will devised the same to Henry Livingston, of Claverack, who, by his will, devised the same to his son Henry, who, with his wife, had, on July 8th, 1843, by deed, conveyed all their right, title and interest of, in, or to the same Salisbury ore bed to them, the said Herman Livingston, Alonzo Bogardus and James S. Talbot, by which deed they became seized in fee, as tenants in common, of  $\frac{3}{8}$ ths of the ore bed, and were desirous of severing their joint interest in the ore bed, released and conveyed to each other an undivided eighth thereof. These three-eighths, subsequently, and prior to 1847, were conveyed as follows:  $\frac{1}{8}$ th by Herman to Timothy Chittenden;  $\frac{1}{8}$ th to Maria S. Bogardus; and  $\frac{1}{8}$ th to Orsamus Bushnell, Trustee for Catherine L. Talbot. In the year 1844, the General Assembly amended the defendant's charter. The amendment provided, among other things, that the property of the corporation should be deemed personal estate, to be divided into shares not exceeding \$100 each, transferable in such manner as the corporation should direct. In the year 1847, the charter was further amended in manner following, omitting the preamble: "Sec. 1. The proprietors of said ore bed are hereby created a corporation, by the name of 'The Proprietors of the Ore Bed in Salisbury,' with a common seal, which they may establish and alter at pleasure, and that, by that name, they may sue and be sued, contract and be contracted with, and that they shall have all the powers and privileges which may be necessary to the full, complete and profitable enjoyment of their said property, rights and privileges. Sec. 2. The ore bed of said proprietors, and the rights and privileges of said proprietors to the same, and in the land aforesaid, are hereby declared, and the same hereafter shall be, personal estate and not real estate; and the same shall be a corporate stock, divisible into shares, not exceeding one hundred dollars per share, transferable on the books of the corporation in such manner as its by-laws shall direct. Sec. 3. The application of said proprietors, made by them, their guardians, agents or attorney, shall be binding

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*Livingston v. The Proprietors of the Ore Bed in Salisbury.*

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upon said proprietors; and this resolve shall be binding upon all other proprietors who may not have joined in said petition, and who shall not, within one year from its passage, signify, in writing, to the clerk of said corporation, his dissent from the provisions of the same. Sec. 4. The shares of said proprietors in the corporate stock shall be in proportion to their respective interests in said property; and any proprietors aggrieved by the refusal of said corporation to assign to him his relative share or shares of said stock, may have the same determined by proceedings upon a bill in equity, or by an action upon the case, in any Court of competent jurisdiction. Sec. 5. The officers of said corporation shall consist of a president, clerk, who shall be sworn, and three directors, all of whom, after the first meeting, shall be chosen at the annual meeting of the corporation, by ballot. Sec. 6. The first meeting of said corporation may be called by the said William Ashley or Timothy Chittenden, by a notice published in the Litchfield Enquirer, three times before the day of holding said meeting; at which meeting the officers aforesaid may be chosen, and such by-laws, rules and regulations established as said corporation shall determine, which said by-laws, rules and regulations may be altered, modified or repealed, as occasion shall require, at any annual meeting of said corporation. Sec. 7. Said by-laws, rules and regulations shall contain nothing repugnant to the Constitution and laws of this State; and this resolve shall at all times be subject to alteration or repeal by the General Assembly. Sec. 8. Those parts of the resolves of 1784 and 1844 which are inconsistent with this resolve are hereby repealed." Under the amendment of 1847, the corporation was reorganized, at a meeting held August 25th, 1847, at which Timothy Chittenden, Orsamus Bushnell, trustee for Catherine L. Talbot, and Charles Paget, as attorney of Maria S. Bogardus, each claiming one-eighth part of the real estate, were present. At this meeting by-laws were adopted, providing, among other things, that the shares of the proprietors should be four hundred in number, of the expressed value of \$100 per share, and for the

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*Livingston v. The Proprietors of the Ore Bed in Salisbury.*

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form of the stock certificates. There was a contest between the Ashley and the Adam families, as to the title of two-sixteenths of one-eighth. Timothy Chittenden, William G. Bates and Samuel F. Adam were appointed a committee to ascertain the true owners of the ore bed, and report at the next annual meeting the names of said owners and the amount owned by each. At the next meeting, on November 30th, 1847, the following resolution was adopted: "That each individual proprietor in the ore bed, before he receives any stock or dividends, shall convey all his interest in said ore bed to the corporation; that, upon giving such conveyance, stock equal in amount to the interest of the proprietors shall be apportioned to such proprietor, upon his giving satisfactory security to the directors, to indemnify the corporation for all loss or damage it may sustain in consequence of issuing the same or paying dividends thereon, and that he will surrender, on demand, for cancellation, so much of said stock as shall appear to have been improperly issued." At a meeting held November 28th, 1848, the committee reported, "that the stock be issued to the several proprietors according to the proportions which have been paid for the last twenty years or upward, and that the corporation receive deeds from the several proprietors, of their respective shares in said ore bed, excepting that two-sixteenths part of one-eighth of said bed shall not be affected by such conveyances, and that the same shall be reserved, as a fund for the payment of debts and expenses, until the title to said fractional part shall be investigated, and that, to secure the rights of the several proprietors to their shares of said two-sixteenths, the following vote (resolution) be passed, which shall save to each the same rights he now has to the same: 'That, whereas, for a period of more than twenty years, the rents and profits of the ore hill in Salisbury has been divided as follows, viz.: to the heirs of Philip Livingston and their grantees, three-eighth parts of the same; to William Ashley and his grantors, one-eighth; to Timothy Chittenden and his grantors, one-eighth; to the heirs of Samuel Forbes two-eighths and fourteen-six-

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*Livingston v. The Proprietors of the Ore Bed in Salisbury.*

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teenths of one-eighth ; and also to all the said proprietors, in like proportion, the remaining two-sixteenths of one-eighth part of the same : and, whereas, there is a difference of opinion between certain of the proprietors as to the ownership of two-sixteenths of one-eighth of said ore bed, now, therefore, it is hereby voted and declared, that the corporation will receive deeds from said proprietors, of the respective proportions of said ore bed, as above stated, and will issue stock to the owners of said ore bed according to the proportions above stated ; and that the remaining two-sixteenths of one-eighth of said ore bed be left without any issue of scrip for the same, until otherwise ordered, when the title to the same shall be ascertained, and that, in the meantime, the rents and profits of the same be appropriated towards the payment of the debts and expenses of the corporation.' The report was accepted, and the accompanying vote was passed. A certificate for fifty shares of stock was issued to Timothy Chittenden, Orsamus Bushnell, trustee for Catherine L. Talbot, and Maria S. Bogardus, each. These one hundred and fifty shares of stock represent the same, and all the same, three-eighths interest which Robert Livingston devised to his sons, Henry, Walter and John. These shareholders conveyed, by separate deeds, to the company, their interest in the ore bed, and said Chittenden and said Bogardus annexed to their deeds a covenant, by which, after referring to the by-law or resolution requiring security, by way of indemnifying the corporation for all loss it might sustain, &c., they covenanted to indemnify the corporation against all loss or damage it might sustain by issuing stock to them, and against all loss or damage it might sustain by paying dividends thereon ; and that they, their executors, &c., would, at any and all times, surrender, on demand, for cancellation, so much of said stock as should appear to have been improperly issued." Dividends have regularly been paid to these shareholders, or to their assignees, upon said one hundred and fifty shares of stock, ever since the year 1847. Herman Livingston, son of John, died in May, 1872, aged eighty years, and, by his will, made Herman

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*Livingston v. The Proprietors of the Ore Bed in Salisbury.*

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T. Livingston, the plaintiff, his residuary legatee and devisee, who made demand of the defendant for fifty shares of stock, on May 5th, 1874. This was the first demand ever made upon the corporation by any heir or representative of John Livingston. Herman Livingston asserted, in conversation with his son and others, in the latter part of his life, that he had an interest, through his father, in the Salisbury ore bed, which ought to be pressed. Since 1848, the corporation has been in entire and exclusive possession of the real estate. No fraud or concealment of facts on the part of the defendant, or of General Henry, or of his successors, is claimed.

Assuming what is denied by the defendant, that the wills of Robert and John were legally probated in this State, and, as probated, are competent evidence of the title to real estate in this State which was devised by such wills, it is apparent that an undivided one-eighth of the ore bed became vested in John, in fee, by the residuary devise in Robert's will, and that this one-eighth has never been conveyed by any recorded deed of John, Herman or Herman T.; and it is also apparent, that, at least since 1844, the grantees of the grand-nephew of General Henry have openly and continuously claimed to be the owners of the one-eighth which was devised to John.

For the purpose of deciding the questions which naturally arise under this equity proceeding, it is not necessary to determine whether there has been a technical ouster or disseisin or dispossession of John or Herman by any or all of their cotenants, or whether there has been such a series of acts, or claim of right or title or adverse possession, from which an ouster or dispossession can be presumed; but it is important to ascertain the real nature of the relations between General Henry and his brother John, or between their devisees, respecting John's interest or rights in the land or the profits arising from his one-eighth, if an ascertainment is practicable. The plaintiff's theory is, that General Henry was the representative of the Livingston family, in the management of the ore bed; and that, as such representative, he received the dividends or profits belonging to such branch, and paid John his share.

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*Livingston v. The Proprietors of the Ore Bed in Salisbury.*

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The defendant's theory is, that there was an arrangement or agreement between the two brothers, by which John's share in the profits or in the land was sold or transferred to Henry. It is to be observed, that the testimony in the case, except that derived from the record title and the deeds of the various parties, is exceedingly scanty. There are no memoranda or agreements or receipts or letters which throw any light upon the way in which General Henry and his brother regarded John's ore bed interest. This lack of evidence does not arise from any laches in the preparation of the case, for, the astute and learned counsel have, evidently, made diligent search in all the hiding places in which they supposed that information might be concealed. But, there are some significant facts which plainly appear. The ore bed interest which Robert Livingston owned, was not, in his lifetime, of large pecuniary value, but it was not an insignificant part of his great estate. It supplied his Ancram furnace with ore of a remarkable quality. Robert Livingston and his father diligently added to the one-eighth which Philip Livingston received by grant in 1735, until Robert owned, at his death, one-half of the bed. The ore bed right which John inherited did not probably disappear from his sight or memory, as a trifling affair. If Henry took it, he took it with the full knowledge of his brother. It is apparent to my mind, that, after John's death, in 1822, no moneys were paid upon ore bed account to Herman, his residuary legatee. If there had been, Herman, who was thirty years of age at his father's death, would have known and remembered the fact, and would not have waited until he was nearly eighty, before complaining that there was an interest in the ore bed which properly belonged to him. If he had ever received dividends, they would not have been quietly abandoned, while Robert's children were annually receiving their share; and such a fact would have been emphasized when he was making the general assertion that his father was interested in the ore bed, and that he did not believe that there had been any alienation of the interest. If, then, Herman did not receive any dividends, is it probable that there was

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Livingston v. The Proprietors of the Ore Bed in Salisbury.

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a stoppage in payments at John's death? If Henry had been in the habit of paying dividends to John, that fact would have been known by John's children, and Herman would not naturally have permitted a change in the course of business without some expostulation and complaint; and the complaint would have been repeated as he informed his son of the loss of the interest. The theory that no dividends were paid to John gains some confirmation from this consideration: General Henry was the owner of great lot No. 3, in which was the Ancram furnace. He had promised to devise to John's son Henry one-half of this part of the Manor. John knew, or expected, that his son was to be the heir of nearly one-half of his brother's patrimony, and might naturally have knowingly consented that the share of the ore bed, which was not of great value to him, but was of importance to the owner of the furnace, should be enjoyed by Henry without compensation. There is no inherent improbability in the theory that no dividends were ever paid to John, and that the non-payment was the result of a friendly and family agreement to that effect, between two brothers who were on terms of intimacy, and who had made family treaties with each other in regard to their property, and that no deed or conveyance was ever made, but that it was understood that Henry was to be, in fact, the owner. But, in my opinion, the testimony in regard to the business relations between John and Henry is so scanty, that it cannot be found, either that no dividends were paid to John, or that no dividends were paid by reason of a family arrangement to that effect. It can, however, properly be found, that payment of dividends upon John's one-eighth was not made to his son after John's death in 1822.

It is not claimed that any facts were concealed from John or Herman, or that any fraud was practised upon them. It cannot be that they should not, in their lifetime, have known the condition of the ore bed rights. John and General Henry lived near each other, on terms of intimacy. General Henry was the agent of the corporation. Henry of Claverack,

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Livingston v. The Proprietors of the Ore Bed in Salisbury.

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Herman's brother, was agent for five years after General Henry's death. Herman and John S. Livingston, son of Robert Cambridge, who sometimes attended the meetings of the corporation, were on quite intimate terms. It cannot reasonably be supposed that the affairs of this corporation, or its re-organization, should have been a sealed book to Herman during the fifty years after his father's death. He must naturally have known the general history of the corporation, and, knowing that his father had the legal title to one-eighth of the property, and believing that the title had never been transferred, it was his duty to look after the interest which he thought might belong to him, and, if he neglected or postponed that duty, his estate must suffer the consequences of his laches. If he was absorbed in other business and thoughts, and did not acquaint himself with the affairs of the corporation, he is still amenable to the charge of neglect.

What, then, is the position of the plaintiff, in a Court of equity? He is claiming stock, growing out of real estate, the benefits of which his devisor did not enjoy for fifty years prior to his death, and which has been openly claimed, since 1841, by the present stockholders, or their assignors, as their own. The plaintiff's father remained silent while the corporation was being re-organized with no little deliberation, and no demand for stock was made until 1874. He was, during this fifty years, in a position to know the history of the corporation and of the interest in the ore bed which descended from his grandfather, and, while believing that his father's title had never been aliened, neglected to make any claim upon those who were notoriously in the enjoyment of the interest which he thought might be his own. The delay is owing to a want of the diligence "which is fairly to be expected from a reasonable person." (*Upton v. Tribilcock*, 91 U.S., 45.)

The principles which govern a Court of equity in similar cases have been often stated, and are thus summarized in *Badger v. Badger*, (2 Wall., 87.): "But there is a defence peculiar to Courts of equity, founded on lapse of time and the

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 Livingston v. The Proprietors of the Ore Bed in Salisbury.
 

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staleness of the claim, where no statute of limitations governs the case. In such cases, Courts of equity, acting upon their own inherent doctrine, of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the Chancellor." The same general principles, in their application to different classes of facts, are either stated or alluded to in *Upton v. Tribilcock*, (91 U. S., 45;) *Sullivan v. Railroad Co.*, (94 U. S., 806;) *Broderick's Will*, (21 Wall., 503;) 2 *Story's Eq. Juris.*, sec. 1520, a. But, it is said that the corporation, by the Act of 1847, became the trustee, of a direct express trust, created by the Act, and not by contract, to issue to the proprietors of the ore bed scrip for the shares of stock to which they were entitled, which trust has never been executed, and that, in consequence of the provisions of the resolution in regard to indemnity and of the taking of indemnity by the corporation, it is in the same position as if it still held unissued shares of stock which belonged to the plaintiff. Admitting that, at the time of the re-organization, the corporation became a trustee to issue stock to those who were entitled to it, it does not follow that lapse of time constitutes no bar to a claimant of stock whose stock has been issued *bona fide* to an apparently rightful owner, and as to which the trust is no longer admitted by the corporation to exist, and where there has been no fraudulent and successful concealment of the facts from the knowledge of the *cestui que trust*. (*Badger v. Badger*, 2 Wall., 87.) "It is often suggested, that lapse of time constitutes no bar, in cases of trust. But this proposition must be received with its appropriate qualifications. As long as the relation of trustee and *cestui que trust* is acknowledged to exist between the parties, and the trust is con-

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Livingston v. The Proprietors of the Ore Bed in Salisbury.

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tinued, lapse of time can constitute no bar to an account or other proper relief for the *cestui que trust*. But, when this relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a Court of equity will refuse relief, upon the ground of lapse of time and its inability to do complete justice. This doctrine will apply even to cases of express trust." (2 *Story's Eq. Juris.*, sec. 1520, *u* ; *Wilmerding v. Russ*, 33 *Conn.*, 67.) Neither is it true, that, in this case, the corporation is in the same position as if it held unissued stock for an unknown owner. The stock was originally issued to proprietors in the proportions in which dividends had been paid for twenty years and upwards. The corporation endeavored to perform its duty by issuing stock to the apparently rightful claimants, and to the only claimants. The aggrieved had their remedy, not, however, if they slept upon their rights and acquiesced for a great length of time, and if, in consequence of their laches, the corporation and *bona fide* purchasers were to be injured. It is manifest, that, at this late day, the covenants of Chittenden and Bogardus furnish no satisfactory indemnity to the defendant. Their stock is now owned by different persons.

Let the bill be dismissed.

*Thomas C. Ingersoll, Jacob F. Miller and Jacob Sutherland*, for the plaintiff.

*Donald J. Warner, Henry C. Robinson and Charles B. Andrews*, for the defendant.

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The National School Furniture Company v. Paton.

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## THE NATIONAL SCHOOL FURNITURE COMPANY

vs.

ROBERT PATON AND OTHERS. IN EQUITY.

Where a defendant, in opposing a motion for a preliminary injunction to restrain the infringement of a patent, which was granted, and in afterwards opposing a motion to punish him for a contempt in violating such injunction by making and selling a certain form of school desk, neglected to present to the Court alleged facts as to his own manufacture and sale of such form of school desk at a date early enough to anticipate the patent, it was held that he ought not to be afterwards allowed to present such alleged facts, on a motion to dissolve such injunction.

(Before BLATCHFORD, J., Southern District of New York, August 4th, 1879.)

BLATCHFORD, J. An injunction has been granted in this case, on patent No. 115,232. On a motion to punish the defendants for a contempt for violating that injunction, a certain form of desk, called by the defendants, a "normal desk," with a book-rest attachment, was held to be an infringement of said patent, and the defendants were held guilty of a contempt in violating said injunction, by making and selling said "normal desk" with said attachment. They now come in and move to dissolve the injunction for the future, as respects said "normal desk" with such attachment, on affidavits which they claim show that they actually made such form of "normal desk" with such attachment, as early as the year 1866, certainly as early as the year 1869, and before the invention covered by the plaintiff's patent was made, such patent having been issued in 1871. This form of desk, so alleged to have been made by the defendants in 1866 is claimed to have been made by them for Mr. Van Norman. Yet, neither in opposition to the motion for an injunction, nor in opposition to the motion to punish them for contempt in making such form of desk, did they, or either of them, or

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The National School Furniture Company v. Paton.

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their foreman, or Mr. Van Norman, or any one else, testify that such form of desk had been made by them as early as the time now alleged. So far from this, in opposing the motion for an injunction, the defendants testified to, and produced, a form of desk which they had made for Mr. Van Norman prior to the plaintiff's invention, but which was not the form now in question—the "normal desk" with the book-rest attachment. They had their books, their recollection, that of their foreman, capacity to find Mr. Van Norman, and the testimony as to the desk would have been as useful to them then as now, and they must have so understood it. Still more, in opposition to the contempt motion, the defendant Robert Paton testified, that he had made the "normal desk," with the book-rest attachment, "for several years," but assigned no specific date earlier than July, 1875. Under such circumstances, the defendants ought not to be heard to allege matter claimed to have been then existing, which they thus neglected to present to the Court, and have the benefit of it now to dissolve an injunction properly granted. (*Woolworth v. Rogers*, 3 *Woodb. & M.*, 135, 143.) If this rule ought to be relaxed in any case, this is not one. The excuses offered by the defendants for not sooner bringing in the evidence now offered, are not, on all the facts before the Court, satisfactory, and, under all the circumstances, the Court cannot but regard it as doubtful whether in fact the defendants made any "normal desk" with the book-rest attachment, at an earlier date than that of the plaintiff's invention.

The motion is, therefore, denied.

*Frederic H. Betts*, for the plaintiff.

*Francis Forbes*, for the defendants.

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Davis v. Pendergast.

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## WILLIAM R. DAVIS AND OTHERS

vs.

## CHARLES H. PENDERGAST AND OTHERS.

The libellants executed to the respondents a charter party of a vessel for a voyage from New York to Rio de Janeiro, by which "forty-five" running days were allowed for loading and discharging, and, if the vessel was longer detained, the defendants were to pay damages, at so much per day, provided such detention should happen "by default" of the respondents: *Held*, that the respondents took the risk of detention by intervening Sundays and holidays and by custom house and port regulations as to taking in or discharging cargo, lack of wharfage or lighterage facilities, not due to any fault of the vessel, and the like; and that detention by any of those risks placed the respondents in "default" and rendered them liable for demurrage.

(Before WAITE, Ch. J., Southern District of New York, August 5th, 1879.)

THIS was a libel *in personam*, filed in the District Court, in Admiralty. That Court dismissed the libel, (8 *Benedict*, 84,) and the respondents appealed to this Court. This Court found the following facts: "In the month of September, 1866, the parties hereto executed a charter party, by which the libellants chartered to the respondents the bark Mary and Louisa, for a voyage from New York to Rio de Janeiro, Brazil. The provisions of the charter party material to the decision of the cause are as follows: 'It is further agreed between the parties to this instrument, that the said parties of the second part shall be allowed, for the loading and discharging of the said vessel, at the ports aforesaid, lay days as follows, that is to say, forty-five running days for loading and discharging; and, in case the vessel is longer detained, the said parties of the second part agree to pay to the said parties of the first part demurrage at the rate of nine pounds sterling per day, day by day, for every day so detained, provided such detention shall happen by default of the said parties of the

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Davis v. Pendergast.

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second part, or their agent. It is also further understood and agreed, that the cargo shall be received and delivered alongside, within reach of the vessel's tackles, or according to the customs of the port. It is also further understood and agreed, that this charter shall commence when the vessel is ready to receive cargo at her place of loading, and notice thereof is given to the parties of the second part, or to their agent, in writing. Vessel to be consigned to charterer's friends at port of discharge, subject to a commission of two and a half per cent.' Thirty-two days were consumed in loading. The cargo consisted of 210 tons of coal, about 130,000 feet of lumber belonging to the respondents, and an assorted cargo of general merchandise, belonging to various consignees. The bark was consigned to the agents of the respondents in Rio de Janeiro. She arrived out on the 19th of December, and was ready to discharge cargo on the 24th, of all which the agents of the respondents were duly notified. The cargo was not finally discharged until January 19th. By the custom house regulations, the assorted cargo could only be discharged at the custom house, either from the vessel alongside, or by means of lighters. If lighters are employed, the expense is paid by the vessel. If the discharge is made at the custom house, the vessel must wait her turn for a place alongside. All the cargo on the bark was discharged upon lighters except the coal, which was delivered from the vessel at a wharf. The lighters were furnished by the consignees and paid by the vessel. Seven days were occupied in discharging the coal, when it might have been put out in half that time. The reason for this delay was, that the coal had been sold by the agents of the respondents, and was to be delivered at the rate of thirty tons per day. The lumber was delivered from the lighters to the different persons to whom it had been sold by the agents of the respondents. Much delay was caused by this mode of doing business, sometimes on account of the great distances the lighters were sent, and sometimes by the refusal of parties to take the lumber. There was no time when the persons receiving the cargo were delayed by the

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Davis v. Pendergast.

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vessel. The lumber could have been put off in a little more than two days at the wharf, or upon lighters, if they had been ready to take it. The master of the vessel frequently called upon the consignees to furnish him with lighters more rapidly. The assorted goods were discharged by the lighters as soon as they could have been if the vessel had waited her turn at the custom house. The charter money, £700, sterling, was payable on delivery of the cargo at the port of discharge."

*Welcomes R. Beebe*, for the libellants.

*John N. Whiting*, for the respondents.

WATTE, Ch. J. The lay days allowed by this charter are forty-five *running* days, that is to say, forty-five days as they run, day by day, from the time the vessel was ready and in a condition to load or unload, and notice thereof to the respondents or their agents. The term "running days" was evidently employed to exclude the idea of working days only. This throws upon the respondents all the risks of detention by intervening Sundays and holidays, as well as by the ordinary interruptions incident to the business, such as custom house and port regulations in reference to the manner of taking in or discharging cargo, lack of wharfage or lighterage facilities, not due to any fault of the vessel, and the like. The respondents, in effect, agreed that no more than forty-five running days should be occupied in loading and discharging the cargo, unless it was occasioned by some fault of the vessel, or some unusual and extraordinary interruption that could not have been anticipated when the contract was made. Detention by reason of any of the risks assumed by the respondents placed them in "default," within the meaning of that term as used in the charter, and rendered them liable for the stipulated demurrage.

It is conceded, that thirty-two days were occupied in putting the cargo on board. No complaint is made by the respondents on this account. The testimony shows, that the

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Davis v. Pendergast.

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vessel was ready and in a condition to commence unloading on the 24th of December, and the agents of the respondents were duly notified on that day. She was then at anchor on the anchorage ground set apart by the port regulations for vessels lying in the harbor for a discharge of cargo. It is also shown, that, by the customs regulations, the assorted cargo could only be unloaded into the custom house from the vessel alongside, or by lighters. If discharged from the vessel into the custom house, it would be necessary for the vessel to wait her turn to come alongside. In this case, lighters were employed and paid by the vessel, as it was supposed in this way time might be saved, other vessels being ahead at the custom house. No specific charges of neglect are made against the vessel. The respondents required that their agents at Rio de Janeiro should be her consignees. This was, undoubtedly, to avoid disputes as to her diligence in discharging, and also to accommodate the respondents in receiving cargo. If, by reason of their agency for the respondents, the consignees failed in their duty to the vessel, it is not right that the respondents should be charged with the loss. It was the duty of the consignees to employ lighters for the vessel, when required. In this case, the consignees were repeatedly asked by the master to send lighters along more rapidly, and I cannot but think that the delay was caused by a scarcity of lighters, or an inability to unload them at the custom house, or, by what is, perhaps, even more likely, a desire on the part of the consignees to accommodate themselves, as the agents of the respondents, in making their deliveries to purchasers under sales effected after the vessel arrived in port. Certainly, I can see no fault on the part of the vessel. She was ready to unload, within the meaning of the charter, when she was at a place in the harbor where she could be unloaded, and had done all that was required of her in furnishing the facilities for unloading. In point of fact, she was prevented from going alongside of the custom house for want of room, the agents of the respondents preferred to have the lumber put out on lighters, so as to facilitate their

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The Fidelity.

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own deliveries, and the coal, although finally put out on a wharf, was kept back by the same agents, to enable them to comply with their own contracts of sale.

Without pursuing the subject further, it is sufficient to say, that, after a careful consideration of all the evidence, I am clearly of the opinion that the detention beyond the stipulated lay days was caused solely by the default of the respondents, within the meaning of the charter, and that, as a consequence, they are liable for the stipulated demurrage, and interest from January 19th, 1867. The charter money and demurrage were payable in Rio de Janeiro. As no attempt has been made to show the legal rate of interest at that place, it may be calculated at the rate of six *per cent. per annum*.

A decree may be prepared in favor of the libellants, for the legal value, in dollars, of £117, and the accrued interest.

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THE FIDELITY.

A steam-tug, the property of a municipal corporation invested with certain powers of local government in a city, and used exclusively by an executive department of such municipal government, as an instrument for performing duties imposed on it by law, is not liable to seizure in a suit *in rem* against such steam-tug, in Admiralty, in the District Court, brought to recover damages for an act of the tug, while actually engaged in public service under the orders of such department.

A stipulation filed to obtain the release of the tug is not a waiver of the question as to the original liability of the tug.

(Before WAITE, Ch. J., Southern District of New York, August 5th, 1879.)

THIS was a libel *in rem*, filed in the District Court, in Admiralty. That Court dismissed the libel and the claimant appealed to this Court. This Court found the following facts: "The steam-tug Fidelity, at the time of the occurrences complained of, and at the time of the commencement of this suit,

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The Fidelity.

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was the property of the Mayor, Aldermen and Commonalty of the city of New York, a municipal corporation of the State of New York, invested with certain powers of local government within the limits of its jurisdiction. She was used exclusively by the Department of Public Charities and Correction, one of the executive departments of the municipal government, and was one of the instruments by means of which that department was enabled to perform the duties imposed on it by law. It was public property, devoted to a specific public use in connection with the daily operations of the government. The injuries complained of occurred, and the attachment under the process issued in this action was made, within the jurisdiction of the municipality, and while the tug was actually engaged in public service under the orders of the department to which she belonged. The canal-boat Herbert Phillips, owned by the libellant, was employed by the same Department of Charities and Correction to transport a cargo of coal from Hoboken, N. J., to Blackwell's Island. After her arrival at the Island she was taken by the Fidelity, under orders from the department authorities, and placed alongside of what is known as the penitentiary dock, and there made fast. On the morning of the 8th of April, 1876, the department officials, being desirous of unloading at that dock a schooner having ice on board for the use of the institutions under their charge on the Island, requested those on board the canal-boat to move her forward out of the way, so as to let the schooner take her place. This not being done, some of the penitentiary convicts, then on the dock, were directed, by the same officials, to let go her lines and move her away. This they did, and, in obedience to orders, placed her alongside an old barge lying against the sea-wall above the dock, but her bow extended a considerable distance beyond the barge, and was headed somewhat out in the stream. All this was done against the remonstrance of those on board the canal-boat. Very soon afterwards, the Fidelity came alongside, and, passing the canal-boat a line, commenced to pull her bow around. In doing so, she was driven against some ob-

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The Fidelity.

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struction in the river, by which a hole was broken into her and she sank. The object of the Fidelity was to remove her to a place of greater safety. The obstruction which caused the injury was not known to or observed by the Fidelity until after the accident."

*Edward D. McCarthy*, for the libellant.

*William C. Whitney*, for the claimant.

WAITE, Ch. J. It is well settled, that public property, devoted to public uses, and necessary for carrying on the operations of the Government, is not subject to seizure and sale on execution. The Supreme Court of the United States had occasion to consider that question at its last term, in *Klein v. New Orleans*, (99 U. S., 149.) It was there said, that "municipal corporations are the local agents of the Government enacting them, and their powers are such as belong to sovereignty. Property and revenue necessary for the exercise of these powers, become a part of the machinery of Government, and, to permit a creditor to seize and sell them to collect his debt, would be to permit him, in some degree, to destroy the Government itself." "The test in such cases is as to the necessity of the property for the due exercise of the functions of the municipality." The same rule prevails in New York, and is laid down broadly and explicitly in *Darlington v. The Mayor*, (31 N. Y., 164, 192,) and *Leonard v. City of Brooklyn*, (71 N. Y., 498, 500.) It would seem to be clear, that, if the instruments of Government cannot be seized to pay a debt after judgment, they cannot before.

It is said, however, that the maritime law gave the libellant a lien on the tug for his damages, and that, whenever there is a maritime lien, an action *in rem* lies, in Admiralty, for its enforcement. It seems to me that the same principle which forbids the seizure to pay a debt, forbids the lien, which can only be enforced by a seizure. Analogous questions have arisen in New York under the mechanics' lien laws,

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The Fidelity.

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and, in the very well considered case of *Brinkerhoff v. The Board of Education*, (2 *Daly*, 443,) the Court of Common Pleas held that such a lien could not be acquired, on the express ground that public property devoted to public uses was exempt by public necessity from seizure and sale under execution. This case, it is said, was affirmed by the Court of Appeals, under the name of *Poillon v. The Mayor*, (47 *N. Y.*, 666.) In *Leonard v. City of Brooklyn*, (71 *N. Y.*, 498, 501,) where a similar question arose, it was said: "If judgments in other actions cannot be enforced by the sale of public property, for the reason that public exigencies require that such property should be exempt from seizure and sale, certainly, a judgment obtained under the lien law \* \* \* should stand in no better position." For the reason, therefore, that the plaintiff's demand could not be "enforced as a mechanic's lien upon property held for public use by the corporate authorities of the city of Brooklyn," a demurrer to his complaint, asking a foreclosure of such a lien, was sustained.

While the libellant concedes that the public vessels of the United States cannot be sued *in rem*, he insists that the exemption arises solely from the fact that the Government itself cannot be sued, and then argues, that, because the municipality of New York may be sued in the common law Courts, the instrumentalities of its Government, coming within the Admiralty jurisdiction, may be proceeded against according to the usages and practice of an Admiralty Court. As has already been seen, the public property of a municipal corporation cannot be seized on an execution, although the corporation may be sued to obtain a judgment on which an execution can issue. The simple right to sue, therefore, does not carry with it the right to seize all property. It follows, necessarily, that the exemption from seizure is not always the same thing as an exemption from suit.

A careful examination of the cases satisfies me that the exemption of public vessels from suits in Admiralty arises not out of a want of power to sue the public owner, but out

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The Fidelity.

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of a want of liability on the part of the vessel. A public vessel is part of the sovereignty to which she belongs, and her liability is merged in that of the sovereign. Under such circumstances, redress must be sought from the sovereign, and not from the instruments he uses in the exercise of his legitimate functions. Public creditors look to the public faith for their security, and not to the public property. But, it is insisted, that, during the public ownership, the maritime liability of the vessel may be incurred, although the remedy in Admiralty is suspended. If this be so, then seamen employed on vessels of war, if their wages are not paid and their vessel is sold to private owners, to be employed in the ordinary business of commerce, may libel the vessel in the hands of her private owners, to secure their money. A simple statement of such a proposition is all that is required to show its fallacy. The real truth is, that, in such cases, the maritime law passes by the thing and places the liability on the sovereign owner alone, and not upon the maritime instrumentalities of his sovereignty. The cases of *The Davis*, (10 Wall., 15,) and *The Siren*, (7 Wall., 152,) are not at all in conflict with this. In the case of *The Davis*, the property was cotton shipped by the treasury agent of the United States, from Savannah; to the cotton agent in New York, and does not appear to have been in any manner devoted to the public use or connected with the operations of the Government. In fact, it appears to have been property collected under the abandoned and captured property Act, and shipped to New York for sale, so that the proceeds might go into the Treasury, in accordance with the requirements of that Act. *The Siren* was a case of prize, and the question was, whether damages caused by a collision, for which she was in fault, while on her way into port for adjudication, should be paid out of the proceeds of her sale on condemnation. No question of public use was involved. There was nothing to take it out of the general rules of maritime law, except its public ownership, and that, all will concede, is not enough. Property does not necessarily become a part of the sovereignty because it is owned by the sovereign.

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The Fidelity.

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To make it so, it must be devoted to the public use, and must be employed in carrying on the operations of the Government. There may be some expressions of the learned Justices who wrote the opinions in these cases, which, if separated from the facts then under consideration, would indicate that the lien extended to public vessels employed in the public service, as well as to others; but that question was not up for determination, and it is proper, therefore, to confine the actual decision to the cases as they stand.

In England, since the time of Edward I, it has been the practice to give the subject a suit against the Crown, in the form of a "petition of right," which, being addressed to the sovereign in person, sets forth the grievance and asks redress. This the sovereign grants by directing "his judges to do justice to the party aggrieved." Thereupon, a judicial investigation of the matter is had, precisely the same as in suits between subject and subject. (*United States v. O'Keefe*, 11 *Wall.*, 178, 183.) In Admiralty, the Lords Commissioners of the Admiralty represent the Crown, and, in cases coming within the Admiralty jurisdiction, they direct the Admiralty proctor to appear and answer a suit to be commenced in the Admiralty Court. This is equivalent to a waiver by the Crown of its privileges as sovereign, and to a consent that the rights of the parties be tried and determined in a suit as between subject and subject. In such cases, process never issues against the vessel, or, if it does, the vessel is not seized, but, when the necessary consent to the suit is given, the Crown appears, and the trial is had. In the case of *The Athol*, (1 *W. Rob.*, 374,) the suit was not, in form even, *in rem*, but *in personam*. An application was made for a monition against the Lords Commissioners, "calling upon them to show cause why damage should not be pronounced for, and compensation awarded to owners of the ship and cargo, and to the master and crew, for the loss of their effects," in a case of collision with a troop-ship belonging to the Crown and at the time engaged in public service. The process was at first refused, on the ground that it could not be enforced if the

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The Fidelity.

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Lords of the Admiralty declined to appear, and also on the ground, that, if it should be found that damages had been occasioned by the fault of the *Athol*, payment could not be enforced. Subsequently, the Lords of the Admiralty came in voluntarily, and the case was heard and decided. The cases of *The Swallow*, (1 *Swabey*, 30,) and *The Inflexible*, *Id.*, 32,) were, in form, against the commanders of the vessels. By its appearance in this form of proceeding, the Crown places itself on an equality with a subject, for the purposes of the controversy in hand, waiving all its privileges of sovereignty. *The Lord Hobart*, (2 *Dods.*, 100,) and *The Marquis of Huntley*, (3 *Hagg.*, 246,) were, in form, suits *in rem*, but there was no seizure and no bail. This was only another way of bringing the Crown into Court. The form was unimportant. What was wanted was the voluntary appearance of the Crown in Court, and a waiver of its sovereign exemptions. For that purpose a suit, such as could be entertained by an Admiralty Court, was required, and, when the submission of the Crown was obtained, the facts were adjudicated as between subject and subject. The suits were modes of proceeding resorted to with the consent of the Crown, for the purpose of determining the question whether the Crown should make good the loss. For that purpose the Crown voluntarily laid aside its sovereignty and consented to be treated, in all that related to the inquiry, as a subject.

This, I think, is all that can be claimed from the English cases. The policy of that Government is to submit itself to the jurisdiction of its own Courts, on applications for a redress of grievances; and a suit in Admiralty is a proper form of proceeding, in cases of maritime loss. For that reason the practice prevails of submitting all such grievances to the determination of that Court. This is far from deciding that public ships can be subjected to maritime liens, without the express consent of the Government to which they belong. That is the question which is now under consideration, and I do not understand that *The Siren* and *The Davis*, (*supra*,)

The Fidelity.

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go further than to decide that the property of the Government, not devoted to the public use, is subject to such liens.

It seems to me, therefore, that, upon the main question, the case is with the claimant, and that the libel must be dismissed. The stipulation filed to obtain the release of the tug is not a waiver of the question as to the original liability of the tug. The stipulation takes the place of the vessel, and, for all the purposes of the trial, the case goes on as if the vessel were itself in Court.

A decree may be prepared dismissing the libel, with costs in both Courts.

# APPENDIX.

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## I.

### RULES.

*Rule of the Circuit Court of the United States for the Northern District of New York, adopted since the publication of the fifteenth volume of these Reports.*

JUNE 15th, 1880.

It is ordered, that hereafter, to entitle any cause to be placed on the calendar of this Court, for trial or hearing, a note of issue, stating the date when issue was joined, and the nature of the issue, together with the names and residences of the attorneys for the respective parties, shall be filed with the clerk of this Court at least eight days before the first day of the term.

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*Rules of the Circuit Court of the United States for the District of Connecticut, adopted since the publication of the fifteenth volume of these Reports.*

APRIL 30th, 1880.

In pursuance of the provisions of section 916 of the Act entitled "An Act to revise and consolidate the statutes of the United States in force on the first day of December, Anno Domini one thousand eight hundred and seventy-three," approved June 22d, 1874, it is ordered, that all the provisions of the public Act of the General Assembly of the State of Connecticut, entitled, "An Act relating to civil actions," approved March 29th, 1878, are hereby adopted by this Court, as rules of this Court in respect to a remedy by judgment lien, to reach the real estate of a judgment debtor, in a common law cause in this Court, which lien can be foreclosed or redeemed in the manner provided in said Act.

August 2d, 1880.

In pursuance of the provisions of the second section of the Act of Congress of the United States, entitled, "An Act making appropriations for certain judicial expenses of the Government for the fiscal year ending June 30th, 1880, and for other purposes," approved June 30th, 1879, Joseph D. Bates, of Hartford, is hereby appointed a Commissioner to discharge the duties prescribed by said Act, in this Court. Suitable boxes will be provided by the Marshal and delivered to the Clerk, for safe keeping of the names of persons to be selected as eligible to serve as grand and petit jurors. One said box shall be provided and designated for the counties of Hartford, Tolland, Windham and New London, which said counties shall be known as Sub-District No. 1, and another box shall be provided and designated for the counties of New Haven, Middlesex, Fairfield and Litchfield, which said counties shall be known as Sub-District No. 2. The said Commissioner and the Clerk of this Court shall, as soon as practicable after the entry of this order, and annually thereafter in the month of August of each year, select, to serve as grand and petit jurors in this Court, and place in the boxes so provided as aforesaid, the names of at least six hundred persons for each Sub-District, each of which persons shall possess the qualifications prescribed in section 800 of the Revised Statutes, being the qualifications set forth in "An Act relating to Jurors," passed by the General Assembly of the State of Connecticut, approved March 25th, 1880, and shall be electors of said State, and residents of said respective Sub-Districts. Each name shall be written on a separate slip of paper, with the person's place of residence; and the said Clerk and the said Commissioner shall each alternately place one name in said respective boxes, commencing with said Clerk, without reference to party affiliations, until the required number shall be completed. If, at any time, less than four hundred names remain in the box, the Clerk and the Commissioner shall replenish the quota in the manner aforesaid. The boxes shall be locked and retained by the Clerk, and the key shall be kept by the Commissioner. The names of all jurors, grand and petit, to serve at any term of this Court, shall be drawn publicly by the Clerk from the box for the Sub-District in which the term is to be held, and from the names placed therein, and, at the close of each term, the ballots containing the names of persons who actually served as jurors, or who proved to be ineligible as jurors, shall be destroyed by the Clerk. The Clerk shall post upon the outer door of the Clerk's office, notice of the time and place of drawing jurors, at least three days prior to the drawing, except where jurors are summoned during a session of Court. All rules inconsistent with this rule are hereby abrogated.

# INDEX.

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## A

### ACTION.

See PASSENGER TAX, 1.  
PLEADING, 2.  
TOWN BOND, 1.

### ADMIRALTY.

1. There is no statute of the United States which authorizes or requires sureties in stipulations or appeal bonds, in a suit *in rem*, in Admiralty, to appear before the Admiralty Court, after a final decree in the suit, for examination concerning their property, according to the laws and practice of the Courts of the State. *The Blanche Page*, 1
2. The mode of enforcing a final decree for the payment of money, in a suit *in rem*, in Admiralty, is that prescribed by Rule 21, in Admiralty, by execution. *id.*
3. A Court of Admiralty of the United States has no power to enforce such a decree against such sureties by the sequestration of their property, according to the practice of Courts of equity. *id.*
4. Nor can it punish such sureties for contempt for not performing their stipulations, or for failing to comply with the provisions of the decree. *id.*
5. The abolition of imprisonment for debt, in New York, makes it impossible for the Circuit Court of the United States, in New York, to use imprisonment as a remedy in execution of a judgment requiring the payment of

money due on such stipulations or appeal bonds. *id.*

6. A steam-tug, the property of a municipal corporation invested with certain powers of local government in a city, and used exclusively by an executive department of such municipal government, as an instrument for performing duties imposed on it by law, is not liable to seizure in a suit *in rem* against such steam-tug, in Admiralty, in the District Court, brought to recover damages for an act of the tug, while actually engaged in public service under the orders of such department. *The Fidelity*, 569
7. A stipulation filed to obtain the release of the tug is not a waiver of the question as to the original liability of the tug. *id.*

See COSTS, 1, 2.

### AGENT.

See FIRE INSURANCE, 8.  
LIFE INSURANCE, 6.

### APPEAL.

See ADMIRALTY, 1 to 5.  
COSTS, 1, 2.  
JURISDICTION.

### ASSUMPSIT.

See TOWN BOND, 1.

### ATTACHMENT.

See NATIONAL BANK.  
PATENT, 15 to 17.

## B

## BANK.

See NATIONAL BANK.  
TOWN BOND, 3.

## BANKRUPTCY.

1. Under the statute in regard to compositions in bankruptcy, (*Act of June 22d, 1874, §§ 17, 18 U. S. Stat. at Large, 182*), a debtor may be excused by the creditors from answering inquiries, even though he is present at the meeting of creditors. *In re Wilson*, 112
2. On a review in bankruptcy the Circuit Court cannot consider objections to a proceeding in composition, that were not taken in the District Court. *id.*
3. It is no valid objection to a composition, that it is unsecured and payable in instalments, and that the property of the debtor is restored to him, to be dealt with at his pleasure. *id.*
4. When questions of policy and expediency have been fairly before the creditors and disposed of by them, and their action has been approved by the register and the District Court, such action will not be interfered with by the Circuit Court, on review. *id.*
5. The provisions of the composition in this case considered and held not to violate the statute or to be improper. *id.*
6. A bankrupt had a permit from the Comptroller of the city of New York to occupy a stand in a market, paying therefor a weekly rental. The license was revocable at the pleasure of the Comptroller, and could not be transferred without written permission. It was the custom of the city to allow such a permit to be assigned. It bore a value, as an article of sale. The bankrupt paid \$4,000 for his permit, to his assignor. He placed that value on it in a statement of his assets made by him, as a basis for credit, to a creditor who afterwards became his assignee in bankruptcy. The

District Court, on the petition of the assignee in bankruptcy, ordered that the bankrupt execute a transfer to the assignee of the right to the permit, and a request to the Comptroller to consent to such transfer. On a petition of review, claiming that the permit was not property which passed to the assignee in bankruptcy: *Held*, that the bankrupt was estopped from asserting that the right enjoyed under the permit was not property in his hands; that the sale value of such right would, when realized by the assignee, under the transfer papers, be the proceeds of the property of the bankrupt; and that the order of the District Court was proper. *In re Gallagher*, 410

7. N. & L. were copartners under the name of N. & Co. They dissolved, owing debts and having no assets. Subsequently, they formed a new partnership, under the name of N., agent, and failed, and were adjudged bankrupts, having firm assets. A creditor of N. & Co. claimed to prove against the firm of N., agent, a debt due by the firm of N. & Co.: *Held*, that he was not entitled to share in the assets of the firm of N., agent, being excluded therefrom by the provisions of § 5,121 of the Revised Statutes of the United States. *In re Nims*, 439

See INJUNCTION.  
PATENT, 8.

## BILL OF LADING.

See CARRIER, 1.

## BOND.

See ADMIRALTY, 1 to 5.  
BOTTOMRY.

## BOTTOMRY.

1. The master of a vessel cannot hypothecate his cargo, by bottomry, without communicating with the owner of the cargo, if communication with such owner be practicable, and such communication must state not merely the necessity for expenditure, but,

also, the necessity for hypothecation.  
*The Julia Blake*, 472

2. A vessel, with cargo, bound from Rio de Janeiro to New York, put into St Thomas in distress. The master, to raise money to repair the vessel, gave a bottomry bond on vessel, freight and cargo. He had notice that C., at Philadelphia, was the consignee of the cargo. He made no communication to him, and no sufficient communication to the shipper of the cargo. He could have communicated with both of them by telegraph: *Held*, that the bond was void as respected the cargo, for want of authority in the master to give it. *id.*

## O

### CARGO.

See BOTTOMRY.  
CARRIER, 2.

### CARRIER.

1. A bill of lading for coir yarn in bales, shipped by a steamer from Liverpool to New York, receipted for the bales as "in good order and well conditioned," and described them as "in transit" from another steamer. They were, apparently, in good external order. The voyage was ten days. The bales, when discharged, appeared to have been, at some time, wet with sea water. The yarn inside was damp to the touch, discolored, and unfit for use to make fine goods. The bales were properly stowed, and nothing appeared as to how they could have been damaged on the steamer. There was no evidence as to the condition of the bales when shipped. On a libel, in Admiralty, against the steamer, to recover for the damage: *Held*, that the libellant could not recover, because he had not shown that the goods were damaged while on board of the steamer. *The Adriatic*, 424
2. A vessel carrying fine table salt in sacks, with powdered arsenic in casks, stowed the arsenic so negligently

that, during the voyage, by severe weather, the casks of arsenic were broken, so that the arsenic escaped and was distributed on some of the sacks and in the vessel. The vessel, without notifying the consignees of the salt of what had occurred, and without separating the sacks with which the arsenic had come in contact from the other sacks, allowed the sacks to be indiscriminately discharged, so that it was impossible to make such separation afterward. On examination of a sack it was found that the arsenic had penetrated the sack covering and impregnated the salt. Nothing but an analysis of each sack could have determined whether the salt in it was fit for consumption. The commercial value of the salt was destroyed and it was sold for fertilizing purposes: *Held*, that the vessel was liable for the difference between the commercial value of the salt, as sound salt, when it was discharged, and what it sold for for fertilizing purposes. *The Niagara*, 516

### CASES COMMENTED ON.

1. United States v. Cruikshank. *United States v. De Grieff*, 20
2. United Nickel Co. v. Harris. *United Nickel Co. v. Manhattan Brass Co.* 68
3. Union Paper Bag Machine Co. v. Pultz & Walkley Co. *Union Paper Bag Machine Co. v. Pultz & Walkley Co.*, 76
4. Anilin v. Higgin. *Anilin v. Cochran*, 155
5. Eadie v. Slimmon. *Robinson v. Mutual Benefit Life Ins. Co.*, 194
6. Barry v. Equitable Life Society, *id.*
7. Wilson v. Lawrence, *id.*

### CHARTER PARTY.

1. The libellants executed to the respondents a charter party of a vessel for a voyage from New York to Rio de Janeiro, by which "forty-five" running days were allowed for loading and discharging, and, if the vessel was longer detained, the defendants were to pay damages, at so much per day, provided such detention should happen "by default" of

the respondents: *Held*, that the respondents took the risk of detention by intervening Sundays and holidays and by custom house and port regulations as to taking in or discharging cargo, lack of wharfage or lighterage facilities, not due to any fault of the vessel, and the like; and that detention by any of those risks placed the respondents in "default" and rendered them liable for demurrage. *Davis v. Pendergast*, 565

### COLLISION.

1. A steamer, which is bound to keep out of the way of another steamer approaching so as to involve a risk of collision, has no right to attempt to pass to the left, unless there is an imperative necessity for it, if that involves a change of course or speed by the other, until she has obtained the consent of the other to such a movement. *The E. H. Coffin*, 421
2. Where there has been a collision between two sailing vessels, and one of them was on the privileged tack, and the other alleges that the former was in fault for keeping her course, she must show that there was time for the former, after the risk of collision was apparent to her, to avoid the collision by changing her course; and, in this case, the latter having been in peril, the failure of the former to take a step in *extremis* of that character, was held not to have been a fault. *The Havre*, 427
3. A vessel bound to keep out of the way of another vessel, and having no lookout, was, in this case, held to be not in fault for a collision between the two vessels, because the case was one of inevitable accident. *The Southern Home*, 447
4. The yellow fever having disabled most of her crew, which was adequate, it was proper for her to pursue her voyage, without putting back or seeking an intermediate port or anchoring, her precautions, with the remaining crew, being reasonable. *id.*
5. A sailing vessel having the wind free and a sailing vessel close-hauled

collided. They were approaching each other very nearly end on, on courses which crossed not far from the place of collision. It being the duty of the former vessel to keep out of the way, she was held in fault for attempting to pass so close to the latter vessel, that a mistake of the latter vessel in luffing caused the collision. The latter vessel was held in fault for luffing, because she had no sufficient lookout, although the luffing was just at the moment of the collision. *The Osseo*, 537

6. In this case, two steam ferry-boats collided in a fog. The one which had the other on her port hand was held solely in fault, she having kept on while the other had come to a stand still, each having heard the blasts of the steam whistle from the other. *The D. S. Gregory*, 542
7. The responsibility of keeping out of the way in a fog is upon both of two approaching steam vessels. *id.*

### CONSTITUTION OF THE UNITED STATES.

Article 1, § 8,	151
Article 3, § 2,	151
5th Amendment,	16, 17

### CONTEMPT.

*See* ADMIRALTY, 4.

### COSTS.

1. Cross libels were filed in the District Court, in Admiralty, for a collision, one being a suit *in personam* and the other a suit *in rem*. In the first suit, the District Court decreed damages and costs against the respondent. In the second suit, that Court dismissed the libel, with costs. The respondent in the first suit appealed, and the libellant in the second suit appealed. This Court, on the appeals, apportioned the damages sustained by the respective parties. One of the vessels was totally lost by the collision. The aggregate costs of both parties in this Court and in the District Court

were divided by this Court equally between the parties. *Vanderbilt v. Reynolds*, 80

2. The rule as to interest on damages and costs, stated. *id.*
3. No costs allowed on dismissing a bill and a cross bill. *Prime v. Brandon Mfg. Co.*, 458

See LIFE INSURANCE, 2.  
NATIONAL BANK, 3.

### COUPON.

See RAILROAD, 1.  
TOWN BOND, 1 to 3.

### CRIMINAL LAW.

1. Section 3,318 of the Revised Statutes of the United States provides that any person who commits any one of the offences therein specified shall pay a penalty of \$100, and shall, on conviction, be fined not less than \$100, nor more than \$5,000, and imprisoned not less than 3 months, nor more than 3 years. The United States brought a civil suit against L. to recover the penalty of \$100 imposed by that section for an offence therein specified, and recovered a judgment therefor, which was paid and satisfied of record. Afterwards L. was arrested on a warrant for the same offence, and was committed for trial. On a *habeas corpus*: *Held*, that the criminal proceeding by the warrant was not a proceeding to punish him twice for the same offence. *In re Leszynsky*, 9
2. The three punishments—the penalty, the fine and the imprisonment—are only one punishment for the same offence, although the penalty is recovered in a civil action, and the fine and imprisonment are inflicted by a criminal prosecution. *id.*
3. An indictment for a violation of § 5,440 of the Revised Statutes of the United States, charged that the defendants conspired to commit an offence against the United States, that is, to wilfully conceal and de-

stroy certain papers relating to certain merchandise called dress trimmings, liable to duty, which had been theretofore imported and brought into the United States, and the port of New York, from a foreign port, by A., for the purpose of suppressing certain evidence of fraud therein contained, describing the papers and averring that they contained statements from the consignors of A., addressed to and received by him in the due course of his business, showing that said merchandise had been knowingly and fraudulently entered and passed through the custom house at New York, on a false classification thereof as to value, and by the payment of less than the duty legally due to the United States, and which papers were material and important evidence for the United States in any proceedings because of said fraudulent entry, and alleging various acts charged to have been done to effect the object of the conspiracy. On a motion to quash the indictment, it was objected, that it was bad for uncertainty, because it omitted to state facts showing the commission of a fraud upon the United States in connection with the importation of the merchandise, and because the contents of the papers were not so stated as to enable the Court to see that they contained evidence of that fraud: *Held*, that the indictment was sufficient. *United States v. De Grieff*, 20

4. By § 5,443 of the Revised Statutes, it is made an offence to conceal or destroy papers of the description given in said indictment. What it would be necessary to aver and prove on an indictment under § 5,443, *quere. id.*
5. The case of *United States v. Cruikshank*, (2 Otto, 542,) commented on and distinguished. *id.*
6. The defendants, though indictable under § 5,443, not having been indicted thereunder, may be indicted under § 5,440. *id.*
7. It is not necessary that a criminal information should show either that the defendant has been held to answer the charge, on a complaint be-

- fore a Commissioner, or that the charge has been found true by a grand jury. *United States v. Moller*, 65
8. A criminal information for a violation of section 5,445 of the Revised Statutes of the United States, in effecting an entry of merchandise, need not set forth the various steps or documents by which the entry was accomplished, so long as the information is otherwise sufficient. *id.*
  9. The question whether a criminal prosecution for the acts complained of will lie after the recovery of a penalty by a civil suit for the same acts, does not arise on a demurrer to the information. *id.*
  10. An indictment under § 5,468 of the Revised Statutes of the United States, which charges a person with having forged a material endorsement on a Post Office money order, with intent to defraud C., charges what is an offence against the United States. *United States v. Morris*, 138
  11. There is no provision of law whereby an indictment found in a Circuit Court can be remitted by it to the District Court, unless the District Attorney deems it necessary. *United States v. Bennett*, 338
  12. The provisions of § 3,893 of the Revised Statutes, as amended by § 1 of the Act of July 12th, 1876, (19 *U. S. Stat. at Large*, 90,) which forbid the depositing in the mail, of any obscene or indecent publication, are not repugnant to any provision of the Constitution of the United States. *id.*
  13. It is not necessary that an indictment under that statute, in respect to a book, should set forth *in haec verba* the alleged obscene book, or the alleged obscene passages in it, if the indictment states that such book is so indecent, that it would be offensive to the Court and improper to be placed on its records, and that, therefore, the jurors do not set forth the same in the indictment, and if the book is sufficiently identified in the indictment for the defendant to know what book is intended. *id.*
  14. The defendant can always procure information of the charge which he is to meet, so far as regards being furnished with a copy of the publication, or with a copy of the alleged obscene parts of it, by applying to the Court, before the trial, for particulars. *id.*
  15. The question whether, on the matter alleged to be obscene, a verdict that it is obscene would be set aside, as clearly against evidence and reason, can be fully raised before the trial, by a motion to be made on the indictment and a bill of particulars; and, under all other circumstances, it is for the jury to say whether the matter is obscene or not. *id.*
  16. A pamphlet of 24 pages, consisting of a sheet and a half secured together by stitching, and with a cover of four pages, and having a title page, is properly described as a book, in an indictment under said statute. *id.*
  17. Whether a count in respect to a publication merely, without averring what kind of publication, is bad for uncertainty, *quere*. *id.*
  18. It is sufficient if the indictment alleges that the defendant knowingly deposited the obscene book, without alleging that he knew it to be non-mailable matter under the statute. *id.*
  19. It was proper to exclude, on the trial, a question put to the defendant, as a witness, as to whether, at any time, in the sale or mailing of the book, he did it with a knowledge or belief that it was obscene. *id.*
  20. The District Attorney having, at the trial, marked the particular portions of the book which he claimed to be within the statute, and having stated that he did not rely on any others, the Court properly refused to permit the counsel for the defendant to read to the jury any portions of the book except the parts so marked, unless they were in immediate connection, to qualify the parts so marked. The marked parts and the con-

texts of the same were read to the jury and commented on by the defendant's counsel in his summing up, and each one of the jurors had a copy of the book in his hand during the reading and took the same with him.

*id.*

21. The Court properly refused to permit the defendant's counsel to read from other books clauses of alleged similar character, by way of illustration.

*id.*

22. The Court properly charged the jury, that the test of obscenity, within the meaning of said statute, is, whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of the sort may fall.

*id.*

23. The object of the use of the obscene words is not a subject for consideration.

*id.*

24. The statute differs from no other criminal statute, so as to require a different rule as to a reasonable doubt, on the evidence.

*id.*

25. During the absence of the jury, the Court sent to them by the officer in charge, and in the absence of the prisoner, after exhibiting the same to the counsel for the prisoner, a direction in writing that they might deliver a sealed verdict to said officer and then separate. They delivered a sealed verdict to said officer, and then separated. The next day they came into Court, and announced, by their foreman, that they had agreed on a verdict, and that he had handed a sealed verdict to said officer. The jury then rendered a verdict of guilty, as stated in such sealed verdict, which was received by the Court from said officer, in the presence of the defendant, and which was thereupon announced, and recorded, in open Court, as a verdict of guilty. The jury were then polled, at the request of the defendant, and each of the jurors answered, that the verdict announced was his verdict. The offence was, by the statute, declared to be a misdemeanor: *Held*, that no ground was shown for granting a new trial.

*id.*

## CUSTOM.

*See* FIRE INSURANCE, 5, 7.

## CUSTOMS.

*See* DUTIES.

## D

## DAMAGES.

*See* LIFE INSURANCE, 8.  
RAILROAD, 1.

## DECREE.

*See* ADMIRALTY, 1 to 5.

## DEMURRAGE.

*See* CHARTER-PARTY.

## DEMURRER.

*See* CRIMINAL LAW, 9.

## DISTILLER.

1. Under § 3,247 of the Revised Statutes, which enacts that every person who, "making or keeping mash, wort or wash, has, also, in his possession or use a still, shall be regarded as a distiller," to make one in possession of a still a distiller, because he keeps mash, wort or wash, the mash, wort or wash kept must be such as will produce spirits, on distillation. *United States v. Frerichs*,  
547

## DIVISION OF OPINION.

*See* JURISDICTION.

## DUTIES.

1. "Calf-hair goods," made to imitate velvet or fur, manufactured of cotton and hair, the warp being cotton and the woof being cattle hair, is not dutiable at the rate of 30 per cent. *ad*

*valorem*, as "a manufacture of hair, not otherwise provided for," under Schedule M, of § 2,504 of the Revised Statutes, but is dutiable at the rate of 35 *per cent. ad valorem*, as "a manufacture of cotton," not otherwise provided for, under Schedule A, of said § 2,504, by applying to it the provisions of § 2,499 of the Revised Statutes. *Butterfield v. Arthur*, 216

## E

## EQUITY.

See COSTS, 3.  
ESTOPPEL.  
INJUNCTION.  
LACHES, 1.  
PATENT, 3, 10 to 14, 43.  
PRACTICE, 6, 9.  
RAILROAD, 2.  
TRADE-MARK.

## ESTOPPEL.

1. L. sued J., in equity, for infringing a patent. J. set up, by plea, that, in June, 1875, L. sued T. for infringing the same patent; that T. was a licensee under a patent granted to W. before the patent to L. was granted, which embodied the improvement described in the patent to L.; that W. assumed the defence of that suit; that it was therein adjudged that W. was the first inventor, and that the patent to L. was void for want of novelty; and that J. was a licensee of W., under a license granted in October, 1874, and was making the article described in the patent to W.: *Held*, that the fact that the license was granted before the judgment was rendered was alone sufficient to prevent the judgment from operating as an estoppel against the plaintiff. *Ingersoll v. Jewett*, 378

## EVIDENCE.

See CRIMINAL LAW, 19 to 21, 24.  
FIRE INSURANCE, 1, 5, 7.  
PRACTICE, 7.  
RAILROAD, 1.  
TOWN BOND, 3.

## EXECUTION.

See ADMIRALTY, 1 to 5.

## F

## FIRE INSURANCE.

1. R. took out a policy of insurance on merchandise, his own, or held by him in trust or on commission: *Held*, that the insurance was on the merchandise and not on the interest of R. in it, and that parol evidence was inadmissible to show that the intent of the parties to the policy was to insure only the goods of R., or his interest in the goods. *Robbins v. Firemen's Fund Ins. Co.*, 122
2. The owner of the property so held on commission by R., and so insured, insured it himself, also: *Held*, that the insurance on such property was double, and that the policy of R. on such property was contributory with the policy of the owner on the same property. *id.*
3. G. instructed N., an insurance broker, to procure fire insurance. N. employed another insurance broker, A., who procured a policy from the defendant, and it passed to G. The policy, in clause 8, provided, that the policy might be terminated at any time, at the request of the assured, and also at the option of the insurer, on giving notice to that effect, and that any person other than the assured, who "may have procured" the insurance to be taken, should be deemed to be the agent of the assured and not of the insurer, "under any circumstances whatever, or in any transaction relating to this insurance." Afterwards the defendant notified A. of its election to then terminate the policy. A. accepted the notice and promised to return the policy. The next night the property insured was burned. G. had no knowledge, then, of the notice of termination. In a suit by G. on the policy: *Held*, that the policy was terminated by the notice. *Grace v. American Central Ins. Co.*, 433

4. By the terms of the policy, A. was the agent of G. for the purpose of accepting notice of the termination of the insurance. *id.*
5. It was competent for the defendant to show a universal custom for the insurer desiring to terminate a risk to give notice to the broker who procured the risk. *id.*
6. The evidence in relation to such custom being positive and uncontradicted, it was not error for the Court not to submit to the jury the question as to whether the existence of such a custom had been proved. *id.*
7. It was not competent for the plaintiff to show a usage that a notice to the broker did not take effect until a reasonable time had elapsed. *id.*
8. The plaintiff, by accepting the policy, ratified the employment of A., so as to make A. the person who procured the insurance. *id.*

## FORGERY.

*See* CRIMINAL LAW, 10.

## G

## GUARANTEE.

*See* RAILROAD, 1.

## I

## IMPRISONMENT FOR DEBT.

*See* ADMIRALTY, 5.

## INDICTMENT.

*See* CRIMINAL LAW, 8 to 5, 10, 11, 13, 17, 18.

## INFORMATION.

*See* CRIMINAL LAW, 7 to 9.

## INJUNCTION.

1. A composition in bankruptcy by T., in the District Court of the United States for the Eastern District of New York, was perfected, he having petitioned in voluntary bankruptcy. After such petition was filed, I., a creditor of T., brought a suit against him, in a State Court in the city of New York, in the Southern District of New York, to recover a debt, and levied an attachment on property of T. After that, T. was adjudicated a bankrupt. I. obtained judgment, and issued an execution, and the sheriff was about to sell the attached property. I. was bound by the composition. T. then brought a suit in equity in the Circuit Court of the United States for the Southern District of New York, against I. and the sheriff, to restrain them, and to have the levy declared void and the property restored to T., and applied for an injunction *pendente lite*: *Held*, that said Circuit Court had no jurisdiction to grant the injunction, being forbidden to do so by § 720 of the Revised Statutes of the United States. *Tift v. Iron Clad Mfg. Co.*, 48
2. Although the suit be one arising under the laws of the United States, within § 1 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) yet the injunction asked is not authorized by the bankrupt law to be issued by the Circuit Court, and so within the exception in § 720 of the Revised Statutes. *id.*

*See* PATENT, 9, 19 to 22, 43.  
RAILROAD, 2.  
TRADE-MARK.

## INSURANCE.

*See* FIRE INSURANCE.  
LIFE INSURANCE.

## INTEREST.

*See* COSTS, 2.  
RAILROAD, 1.

## INTERNAL REVENUE.

1. A corporation which maintains a driving track, with stands and other conveniences for horse-racing, and annually, for several days in succession, devotes such track to horse-racing, and keeps its grounds open, for pay, to the public, and realizes money therefrom, is not liable to a tax on its gross receipts, under § 108 of the Act of June 30th, 1864, (18 *U. S. Stat. at Large*, 276,) as conducting a public exhibition of feats of horsemanship, or a show which is opened to the public for pay. *United States v. Buffalo Park*, 189

See DISTILLER.

## J

## JUDGMENT.

See ADMIRALTY, 1 to 5.  
ESTOPPEL.  
JURISDICTION.  
PLEADING, 2.

## JURISDICTION.

1. Under §§ 650, 652 and 698 of the Revised Statutes of the United States, no civil suit, where there is a certificate of division of opinion, can be taken to the Supreme Court except upon final judgment, and by writ of error or appeal; and, under § 691, as amended by § 3 of the Act of February 16th, 1873, (18 *U. S. Stat. at Large*, 316,) no final judgment or decree can be re-examined unless the matter in dispute exceeds \$5,000. *Robbins v. Firemen's Fund Ins. Co.* 282

See ADMIRALTY.  
INJUNCTION.  
PATENT, 18.  
REMOVAL OF CAUSES, 1, 2.

## JURY.

See CRIMINAL LAW, 25.

## L

## LACHES.

1. L. filed a bill in equity against a corporation, to compel it to issue to him 50 shares of its stock, representing one-eighth of all its shares. The stock grew out of a bed of iron ore. L. claimed under a will made by H., who died in 1872. H. had enjoyed no benefit from the property for 50 years before he died. No demand was made for the stock till L. made it, in 1874. Other persons had openly enjoyed and claimed title to the same 50 shares from 1847. H. was, during the 50 years, in a position to know that his property, if any, was claimed and enjoyed by others: *Held*, that, because of acquiescence and laches and the staleness of the claim, L. could not recover. *Livingston v. Proprietors*, 549

See PATENT, 22.

## LIFE INSURANCE.

1. A mutual life insurance company insured, by an endowment policy, the life of a husband for the sole benefit of his wife, in an amount payable to her on a day named. For four years the company accepted the notes of the husband as payment of one-half of the annual premium. The notes were given on the representation by the company that they would be paid by dividends. The notes pledged the policy and all payments which might become due thereon, to the company, for the payment of the notes. In a suit by the husband and wife, in the right of the wife, against the company, to recover the amount insured, the plaintiffs claimed that the dividends declared, if credited on the notes, would pay them in full. The defendant claimed that the amount due on the policy was the sum insured, less the amount due on the notes: *Held*, that the company was liable for the amount insured without any deduction for the unpaid notes. *Brooks v. Phoenix Mutual Life Ins Co.*, 182

2. The suit having been removed into this Court, under the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) it was held, under § 6 of that Act, and § 968 of the Revised Statutes of the United States, that the plaintiffs were not entitled to costs, because their recovery was less than \$500, exclusive of costs, but that they ought not to pay costs. *id.*
3. A New Jersey life insurance company issued, at Rochester, New York, a policy insuring the life of R., in a sum named, for life, making the sum payable to the wife of R., "or assigns." The policy was to cease, if the annual premium should not be punctually paid. R. and his wife resided, at the time, at Rochester. Afterwards, R. and his wife assigned the policy to M., with the assent of the company. The assignment was, by its terms, absolute, but was intended by the parties as collateral security to M. for any premium he should thereafter pay on the policy. The annual premiums which became due after the assignment, down to the death of R., were paid to the company by M. The company paid to M. the sum insured. Afterwards, M. paid to the widow of R. a certain sum, under an agreement with her that she should receive it in full satisfaction of her interest in the policy. Afterwards, the widow sued the company to recover the sum insured, claiming that the assignment of the policy was void, under the Acts of the Legislature of New York, of April 1st, 1840, April 14th, 1858, March 28th, 1862, and April 18th, 1866, (*Laws of New York*, 1840, *chap.* 80, *p.* 59, and 1858, *chap.* 187, *p.* 306, and 1862, *chap.* 70, *p.* 214, and 1866, *chap.* 656, *p.* 1,413,) respecting insurances of the life of a husband for the benefit of his wife: *Held*, that such assignment was valid, and that the plaintiff was not entitled to recover. *Robinson v. Mutual Benefit Life Ins. Co.*, 194
4. There is no decision of the Courts of New York holding that such an assignment of such a policy is not valid *id.*
5. The cases of *Eadie v. Slimmon*, (26 *N. Y.*, 9,) and *Barry v. The Equitable Life Society*, (59 *N. Y.*, 587,) and *Wilson v. Lawrence*, (8 *Hun*, 593, and 13 *Hun*, 238, and 76 *N. Y.*, 585,) examined. *id.*
6. The agreement of the plaintiff with M., and her receipt of the money from him, was a ratification of his authority to collect from the company the amount insured. *id.*
7. A policy issued by a mutual life insurance company insured, in consideration of ten annual premiums to be paid, the life of W., in the sum of \$1,000, to be paid to him at the age of 40, or to his mother and sister, equally, if he should die before arriving at that age. The policy provided, that, if, after the payment of two premiums, the policy should cease because of the non-payment of premiums, the company would, on the surrender to it of the policy, issue a new policy for the value acquired under the old one, subject to any notes given for premiums, without subjecting the assured to any subsequent charge, except annual interest, in advance, on all premium notes remaining unpaid. W. paid the premium for nine years, in cash. For the rest he gave four notes, still outstanding, on which he had paid the interest annually. He wishing to surrender the policy and take a new one for the value acquired under the old one, the company tendered to him a new policy, which he refused. Subsequently, he tendered to the company, for signature, a written policy, differing in form from the printed form used by the company, but the same, in legal effect, as the policy which he had refused. The company refused to sign the written policy, because it was not its regular printed form. W. had, before tendering the written policy, applied to the company, without success, for a printed form. W. then, before attaining the age of 40, sued the company, seeking to recover, as damages for not issuing the new policy, the premiums for the nine years: *Held*, that the defendant had no right to object to signing the written policy because it was not its printed blank, unless it tendered a policy made by

using such blank. *Watts v. Phoenix Mutual Life Ins. Co.*, 228

8. *Held*, also, that the plaintiff could recover more than nominal damages only in an action in which his mother and sister were co-plaintiffs; that the contract was not rescinded; that proof of the amount paid in premiums was no proof of damage; and that the recovery could be only for nominal damages. *id.*

## M

### MARRIED WOMAN.

*See* LIFE INSURANCE, 3 to 5.

### MASTER.

*See* BOTTOMRY.

### MORTGAGE.

*See* RAILROAD, 2.

### MUNICIPAL CORPORATION.

*See* TOWN BOND.

## N

### NATIONAL BANK.

1. After a circulating note of a national bank, which it had failed to redeem in lawful money, had been protested, under § 46 of the Act of June 3d, 1864, (13 *U. S. Stat. at Large*, 113,) an attachment from a State Court was levied on moneys of said bank on deposit in another national bank, to secure a debt from it to A. Subsequently, a receiver of the bank was appointed, under § 50 of said Act: *Held*, that, under § 52 of said Act, said levy was void. *Harvey v. Allen*, 29

2. The receiver, having applied to the State Court to dissolve such attachment, without becoming a party to

the suit in the State Court, and such motion being denied, and he having then immediately brought this suit against A., and the bank in which the moneys were on deposit, and the sheriff who levied the attachment, to assert his title to such moneys: *Held*, that he was entitled to such relief. *id.*

3. A. having, after process in this suit was served on the defendants, obtained a judgment in his suit in the State Court, and collected it by execution against the moneys so attached, this Court decreed that A. should pay directly to the plaintiff the money he had so collected, and the bank in which the moneys had been on deposit should pay such money if, and only if, it could not be collected from A.; that such bank should pay costs to the plaintiff; that such bank should not have costs against A.; that A. should pay costs to the plaintiff; that the sheriff should not have costs against the plaintiff; that the plaintiff should recover from A. the costs of making the sheriff a party, and the costs of the sheriff's defence, the latter costs to be paid over to the sheriff by the plaintiff, when collected; and that the bank in which the moneys had been on deposit should respond to the plaintiff for them, with interest from the time when process in this suit was served on it, subject to the said decree as to payment by A. of what he had received of such moneys. *id.*

*See* TOWN BOND, 3.

### NAVIGATION.

*See* COLLISION.

### NEW TRIAL.

*See* PRACTICE, 1 to 5.

## O

### OBSCENE PUBLICATION.

*See* CRIMINAL LAW, 11 to 25.

## P

## PARTY.

See PATENT, 10 to 12.

## PASSENGER TAX.

1. T., as Chamberlain of the city of New York, collected from a corporation moneys which it paid under protest, as a passenger tax, under Acts of the Legislature of the State of New York, which the Supreme Court of the United States held to be unconstitutional and void. Afterwards, Congress passed an Act, (*Act of June 19th, 1878, 20 U. S. Stat. at Large, 177,*) validating the collection of the moneys and declaring that no action should lie to recover them back. The moneys paid were paid to relieve the corporation from an accumulation of penalties, the collection of which could be enforced only by judicial proceedings. In a suit by the corporation against the Chamberlain, to recover back the moneys: *Held*, that the payments were voluntarily made and could not be recovered back, although paid under protest. *Oceanic Steam Navigation Co. v. Tappan*, 296

2. Whether such validating Act of Congress is valid, *quere.* *id.*

## PATENT.

1. Invention.
2. Novelty, (1.)
3. Specification.
4. Reissue.
5. Duration, (2.)
6. Extension, (3, 4.)
7. Assignment, (5 to 8.)
8. License, (9.)
9. Suit in Equity, (10 to 14.)
10. Infringement, (15 to 18.)
11. Injunction, (19 to 22.)
12. Attachment.
13. Profits.
14. Particular Patents.
  - (1.) Adams—Electro-deposition of nickel, (23, 24.)
  - (2.) Goodale—Paper-bag machinery, (25, 26.)

- (3.) Burdett—Reed-organ, (27, 28.)
- (4.) Webber—Kindling-wood, (29.)
- (5.) Graebe and Liebermann—Artificial alizarine, (30 to 35.)
- (6.) Fischer—Machine for forming sheet-metal mouldings, (36, 37.)
- (7.) Gordon—Photographic shield, (38.)
- (8.) Giant Powder Company—Explosive compound, (39 to 48.)
- (9.) Gardner—Improvement in chair-seats, (49 to 52.)
- (10.) Fletcher—Government revenue stamp, (53, 54.)
- (11.) Jenkins—Elastic packing, (55.)
- (12.) Simpson—Submarine cable.

1. *Invention.*

See 29, 32, 34, 52.

2. *Novelty.*

1. What degree of clearness and certainty of description is required in a prior publication, in order to defeat a patent. *Colgate v. Gold & Stock Telegraph Co.* 503

See 26, 32, 44, 48 to 52.

3. *Specification.*

See 42.

4. *Reissue.*

See 41.

5. *Duration.*

2. Under § 4,857 of the Revised Statutes, which provides, that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term," a patent granted by the United States, October 20th, 1874, for 17 years from that day, was held to have

expired on the 15th of May, 1878, because a patent was granted in Canada, under the authority of the patentee, for the same invention, on the 15th of May, 1873, for 5 years from that day, although, in March, 1878, the Canada patent was extended for 5 years from the 15th of May, 1878, and, also, for 5 years from the 15th of May, 1883. *Reissner v. Sharp*, 388

#### 6. *Extension.*

3. A patentee, during the original term of his patent, parted with his right to an extension, and agreed to sign all necessary papers to secure the extension for the benefit of his grantee. Afterwards, for the purpose of showing to the Patent Office that he would own the extension, if granted, the full title to the extended term was conveyed to him, before the extension was granted. The extension would not otherwise have been granted. The grantee paid all the expenses of obtaining the extension, and all parties understood that he really was to own the extended term: *Held*, that the original instrument was binding, in equity, on the patentee; that the equitable right to the extended term was in the grantee; that, as the conveyance back to the patentee was made to deceive the Patent Office, it was inoperative; but that, as the original grantee of the right to the extension could not claim the extension except by availing himself of such inoperative instrument, the Court would leave the parties where it found them. *Prime v. Brandon Mfg. Co.*, 458

4. The special Act of Congress, of July 15th, 1870, (16 *U. S. Stat. at Large*, 657,) authorizing an application for an extension to be made to the Commissioner of Patents, did not vary the positions or rights of the parties. *id.*

#### 7. *Assignment.*

5. The case of *Stevens v. Gladding*, (17 *How.*, 455,) examined and explained. *Gordon v. Anthony*, 234

6. An assignment of an interest in a patent, made by a receiver, appointed by a State Court, of the property of the owner of the patent, conveys no title to the assignee, because the assignment is not a written instrument, signed by the owner of the patent. *id.*

7. Where an assignment of a right under a patent refers to the patented improvement as being in use by a certain party, such reference is express information to the assignee of the fact of such use; and, the party referred to being in possession to the extent of such use, such possession is constructive notice of the claim of right under which the possession and use are had. *Prime v. Brandon Mfg. Co.*, 458

8. An assignment of a patent by a bankruptcy Court to the assignee in bankruptcy of the bankrupt owner of the patent need not be recorded in the Patent Office, in order to prevail over a recorded assignment of the patent from the administrator of the bankrupt, made after the bankruptcy, as, by § 5,046 of the Revised Statutes of the United States, all patent rights of the bankrupt vest at once, by operation of law, in the assignee in bankruptcy. *id.*

#### 8. *License.*

9. W., the patentee of inventions in steam stone cutting machines, granted to a corporation "the right to use said patented machine, or any number of said machines," in its quarry at S. C. succeeded to the rights of W., and another corporation to the rights of the corporation grantee in the quarry. D. was making a machine embodying the patented inventions, for the new corporation, for use in said quarry, and C. sought to enjoin D. from making such machine: *Held*, that the grant conveyed the right to make machines for said use, including the right to procure them to be made, and covered the making of them by the person procured to make them. *Steam Stone Cutter Co. v. Shortleeves*, 381

*See ESTOPPEL*  
10 to 12.

9. *Suit in Equity.*

10. A mere licensee under a patent cannot sue, in equity, for the infringement of his rights under the patent, without joining with him, as plaintiff, the owner of the legal title, and such owner is, in such case, a proper party. *Nelson v. McMann*, 189

11. What constitutes a mere licensee, defined. *id.*

12. The instrument under which the plaintiff in this case claimed his rights, held to be only a license. *id.*

13. Although a suit in equity for the infringement of a patent is brought after the patent has expired, and no injunction can be granted, and the bill is not a bill of discovery, the Court has jurisdiction to award an account of profits, and can take cognizance of the suit. *Gordon v. Anthony*, 234

14. A bill without interrogatories, under the amendment to Rule 40 in Equity, made at the December Term, 1850, and which prays only for a disclosure of gains and profits from infringement, is not a bill of discovery. *id.*

*See Costs*, 3.

*ESTOPPEL.*

*PRACTICE*, 6, 9.

3, 48.

10. *Infringement.*

15. On a motion for an attachment for contempt for violating an injunction issued to restrain the infringement of a patent, after a construction has been given to the patent by the Court, no testimony is proper to vary such construction. *Burdett v. Estey*, 105

16. It is a matter of discretion, whether the Court, on such a motion, will require expert testimony on the question of infringement, or will examine the alleged infringing article for itself. *id.*

17. The decision on the motion for attachment was made without prejudice to the raising of the same question of infringement on the accounting under the interlocutory decree. *id.*

18. Sufficient *prima facie* evidence of the use by a defendant of a machine infringing a patent, held to have been given. *Fischer v. Wilson*, 220

*See ESTOPPEL.*

13, 14, 24, 27, 28, 35, 40, 47, 54, 55.

11. *Injunction.*

19. The considerations stated which apply to a case where, after a patent has been sustained on final hearing, a new defendant, in a new suit, seeks to attack the patent for want of novelty. *Colgate v. Gold & Stock Telegraph Co.*, 503

20. Where, on a patent issued in 1867, a suit was brought, in 1872, against its most conspicuous and extensive infringer, and was prosecuted with reasonable diligence, that was sufficient notice to all other infringers that the right conferred by the patent was to be maintained, to require a particular defendant who alleges laches in the plaintiff, to show affirmative acquiescence by the plaintiff in the use of the invention by the defendant. *id.*

21. Form of an order for a preliminary injunction on a patent, in a case where the plaintiff exercises his rights by granting licenses. *id.*

22. Where a defendant, in opposing a motion for a preliminary injunction to restrain the infringement of a patent, which was granted, and in afterwards opposing a motion to punish him for a contempt in violating such injunction by making and selling a certain form of school desk, neglected to present to the Court alleged facts as to his own manufacture and sale of such form of school desk at a date early enough to anticipate the patent, it was held that he ought not to be afterwards allowed to present such alleged facts, on a motion to dissolve such injunction.

*National School Furniture Co. v. Paton,* 568

See TRADE MARK.  
9, 43.

## 12. Attachment.

See 15 to 17.

## 13. Profits.

See 13, 14.

## 14. Particular Patents.

### (1.) *Adams—Electro-deposition of nickel.*

22. The decision in *United Nickel Co. v. Harris*, (15 *Blatchf. C. C. R.*, 319,) sustaining the validity of the letters patent granted to Isaac Adams, Jr., August 3d, 1869, for an "improvement in the electro-deposition of nickel," reviewed and confirmed. *United Nickel Co. v. Manhattan Brass Co.*, 68

24. The said patent is infringed, although the salts of potash and soda are introduced into the solution, provided the solution is not so used as to liberate free potash or free soda. *id.*

### (2.) *Goodale—Paper-bag machinery.*

25. The decision in *Union Paper Bag Machine Co. v. Pultz and Walkley Co.*, (15 *Blatchf. C. C. R.*, 160,) sustaining the validity of the first claim of the letters patent granted to William Goodale, July 12th, 1859, for improvements in machinery for making paper bags, confirmed. *Union Paper Bag Machine Co. v. Pultz & Walkley Co.*, 76

26. An inoperative and abandoned model, containing a three-cutter knife, existed and was known to the patentee, but he was the first to demonstrate that such a knife would, in an organized machine, cut a blank from a roll of paper in the flat sheet, by a transverse cut, so that the blank, when cut off, would be of the form ready to be folded into a bag. Hav-

ing done so, he had a right to claim the knife separately. *id.*

### (3.) *Burdett—Reed-organ.*

27. The question of what is an infringement of the second claim of the patent granted to Riley Burdett, February 23d, 1869, for an "improvement in reed organs," considered, in view of the decision in *Burdett v. Esley*, (15 *Blatchf. C. C. R.*, 349.) *Burdett v. Esley*, 155

28. A structure which has an intermediate partial set of reeds, extending downwards through the scale to tenor F, and placed horizontally on the top of, and in addition to, a common double reed board, with both the vibrating and the stationary ends of the reeds the full thickness of the reed board above the other sets and above the entrances to the air passages, and the valve openings from tenor F downward gradually and uniformly lengthening till the lower and longest one is about half an inch longer than those above tenor F, does not infringe the second claim of said patent. *id.*

### (4.) *Webber—Kindling-wood.*

29. The letters patent granted to J. Wesley Webber, August 17th, 1869, for an "improved kindling-wood," the claim thereof being, "The accompanying or fastening one or more fire-lighters, A, to or with the bundle of the common article of manufacture known as bundle or kindling wood, the fire-lighter to be suitably moulded or pressed, and to be made of a combustible material, such as resin or tar, the ingredients of which I do not claim, my invention consisting wholly of accompanying or fastening a fire-lighter, A, to or with the bundle, or at the string, B, of the bundle of the common article of manufacture known as bundle or kindling wood," are void for want of patentable invention. *Alcott v. Young*, 184

### (5.) *Graebe & Liebermann—Artificial alizarine.*

30. Reissued letters patent No. 4,321. Division B, granted April 4th, 1871,

- to Charles Graebe and Charles Liebermann, for artificial alizarine produced from anthracine, are valid. *Anilin v. Cochrane*, 155
31. The decision of this Court in *Anilin v. Higgin*, (15 *Blatchf. C. C. R.*, 290,) confirmed. *id.*
32. Artificial alizarine, made according to the process of the patent, was a new product, and was patentable. *id.*
33. The application for the patent was not accompanied by any specimen of ingredients or of the compound; but it was for the Patent Office to determine whether the nature of the case admitted of specimens, and the want of them is not made a statutory defence to a patent. *id.*
34. The artificial alizarine of the patent is different from chemically pure alizarine, and the patent covers the invention. *id.*
35. The patent is infringed by an article produced by the process of letters patent No. 153,536, granted July 28th, 1874, to Heinrich Caro, Charles Graebe and Charles Liebermann. *id.*
- (6.) *Fischer—Machine for forming sheet-metal mouldings.*
36. The letters patent, No. 74,068, granted to Valentine Fischer, February 4th, 1868, for an "improvement in machine for forming sheet-metal mouldings," are valid. *Fischer v. Wilson*, 220
37. The 4th claim of the patent, namely, "Arranging the female die, G, above the male die, E or F, for the purpose of keeping the female die clear, as set forth," claims the described arrangement of the two dies, so that, having such a lower male die as E or F is, the female die shall be above the male die, and thus be kept clear, resulting in keeping both dies clear, instead of having the female die below, in a position to be clogged and mar the work, even though the upper male die should clear itself. *id.*
- (7.) *Gordon—Photographic shield.*
38. The letters patent granted to Ebenezer Gordon, October 19th, 1858, for "a photographic shield," are valid. *Gordon v. Anthony*, 234
- (8.) *Giant Powder Company—Explosive compound.*
39. The reissued letters patent, No. 5,799, granted to the Giant Powder Company, March 17th, 1874, for 17 years from the 26th of May, 1868, for an "improved explosive compound," (the original patent having been granted to Julius Bandmann, as assignee of Alfred Nobel, as inventor, as No. 78,317, May 26th, 1868,) are valid. *Atlantic Giant Powder Co. v. Rand*, 250
40. The claim of said patent, namely, "The combination of nitro-glycerine with infusorial earth, or other equivalent absorbent substance, as a new explosive compound," is infringed by an explosive compound known as "rendrock powder," and containing, in 100 parts by weight, 34.71 parts of nitro-glycerine, 52.68 parts of nitrate of potash, 5.84 parts of sulphur and 6.77 parts of woody fibre, charcoal and resin, in nearly equal proportions. *id.*
41. Said reissued patent is not for a different invention from the said original patent. *id.*
42. The specifications of the original and the reissue examined and compared. *id.*
43. Where a defendant has always been notified that it was claimed he infringed, and has not been misled, by any action of the plaintiff, into making investments, and has no peculiar equity as against the plaintiff, an injunction will not be withheld because the plaintiff, having sued the defendant for infringement, permitted the suit to rest until a recovery was had on the patent in other suits, and then discontinued it and brought a new suit against the defendant. *id.*
44. A description in a prior patent, to invalidate a subsequent patent, must

- show how the article can be certainly made, and its making must be the result of directions in the description, and not of accident. *id.*
45. The reissued letters patent No. 5,799, granted to the Giant Powder Company, March 17th, 1874, for an "improved explosive compound," (the original patent having been granted to Julius Bandmann, as assignee of Alfred Nobel, the inventor, as No. 78,317. May 26th, 1868.) are valid. *Atlantic Giant Powder Co. v. Parker*, 281
46. The decision in *Atlantic Giant Powder Co. v. Rand*, (*ante*, p. 250,) confirmed. *id.*
47. The claim of that patent is infringed by a powder called "Neptune Powder," composed of 56 parts of nitrate of soda, 14 parts of charcoal, and 30 parts of nitro-glycerine. *id.*
48. A description in a prior patent, to invalidate a subsequent patent, must be such as to show that the article described in the subsequent patent can be certainly arrived at by following the prior description. *id.*
- (9.) *Gardner—Improvement in chair-seats.*
49. The reissued letters patent granted to George Gardner, William Gardner and Jane E. Gardner, July 4th, 1876, for an "improvement in chair seats," (the original patent having been granted to George Gardner and Gardner & Gardner, May 21st, 1872, on the invention of George Gardner,) are void. *Gardner v. Herz*, 303
50. The invention consisted in constructing chair seats of two or more veneers of wood, with the grains crossing each other, the veneers being glued together by an adhesive substance, and in perforating the seat with holes, for ventilation and ornament. *id.*
51. All except the perforations is described in letters patent granted to John K. Mayo, December 26th, 1865, for "improved material for roofing, tubing, tank, wainscoting, boats, and other structures," and in Division E of the reissue of that patent, granted August 18th, 1868. *id.*
52. As to the perforations, the invention was not patentable, because sheet metal seats of chairs had before been perforated, also india rubber and gutta percha seats for chairs. *id.*
- (10.) *Fletcher—Government revenue stamp.*
53. The letters patent granted to Addison C. Fletcher, June 8th, 1869, for an improved Government revenue stamp, are valid. *Fletcher v. Selden*, 468
54. The claim of said patent, namely, "A postage or revenue stamp, having a portion of its surface composed of thin or fragile paper, or other suitable material loosely attached, and on which a portion of the design or other matter is printed, substantially as and for the purpose or purposes set forth," is limited to a stamp on which the flap is loosely attached to the face of the main body of the stamp, and has a portion of the design imprinted upon it, and is not infringed by a stamp wherein the design is printed on the main body of the stamp, and a portion of the printed stamp is loosely attached to an unprinted slip of paper attached to the back of the main body. *id.*
- (11.) *Jenkins—Elastic packing.*
55. The first claim of the reissued letters patent, No. 3,579, granted, August 3d, 1869, to Nathaniel Jenkins, for an "improvement in the manufacture of elastic packing," namely, "An elastic packing composed of at least four-tenths of finely pulverized refractory earthy or stony material, intimately mingled with, and held together by, rubber prepared for vulcanizing, and then vulcanized, as and for the purpose described," includes only soft vulcanized rubber, and does not include hard rubber, or vulcanite, so called, made of rubber mingled with 25 *per cent*, or over, of sulphur, and then vulcanized. *Clarke v. Johnson*, 495

(12.) *Simpson—Submarine cable.*

56. The decision of this Court in *Colgate v. The Western Union Telegraph Company*, (15 Blatchf. C. C. R., 363,) confirmed. *Colgate v. Gold Stock Telegraph Co.*, 503

## PENALTY.

See CRIMINAL LAW, 1, 2.

## PLEADING.

1. On a general demurrer to a count in an action of account, the question is, whether the count is sufficient in substance, without regard to form, but, sufficient must be alleged in some form to constitute a cause of action. *Travers v. Dyer*, 178
2. In the action of account there are two judgments—one, that the defendant account with the plaintiff; the other, after the accounting, for the balance found due. *id.*
3. The declaration must show the priv-ity by which the plaintiff is entitled to an account, and, also, proceedings under or pursuant to it, raising a balance in his favor, to be recovered. *id.*
4. Counts held bad, for want of such averments. *id.*

See PATENT, 13, 14.  
PRACTICE, 6.

## PRACTICE.

1. When the parties to an action at law have stipulated in writing to refer it to a referee, "to hear, try and determine the issues therein, and that an order may be entered accordingly," and, without such order being entered, the trial before the referee has been had, and he has made his report, such order will be considered as having been entered, and may be entered *nunc pro tunc*. *Robinson v. Mutual Benefit Life Ins. Co.*, 194

2. The stipulation is to be regarded as referring to the practice of the Courts of the State in respect to references by consent. *id.*
3. A reference, by consent, of such an action, in this Court, is lawful. *id.*
4. After a trial before a referee, under such a stipulation, the Court has the power to grant a new trial. *id.*
5. What is a sufficient conformity, in practice, in this Court, to the practice of the Courts of the State, in respect to the review of a trial before a referee. *id.*
6. Where a defendant in a suit in equity puts in proofs to sustain the allegations of his answer, and allows the plaintiff to put in proofs in rebuttal, and proofs in contradiction of the allegations of the answer, without entering any objection on the record that there was no replication to the answer, he is estopped from raising such objection at the hearing. *Fischer v. Wilson*, 220
7. The Major General commanding the Department of the East, in the Army of the United States, was served with a *subpoena duces tecum*, in this suit, requiring him to produce in Court official papers on file in the office of the Headquarters of such Department. A motion was made that such *subpoena* be set aside. It appearing that copies of such papers could be read in evidence, and it not appearing that the originals would serve a different purpose from the copies, or that the copies could not be procured: *Held*, that the motion must be granted. *Corbett v. Gibson*, 334
8. After this cause had been set down for trial at the present term, the defendant moved for an order to compel the plaintiff's attorney to furnish a sworn statement of the residence, occupation and present address of the plaintiff: *Held*, that the motion must be denied, without prejudice to other proceedings to secure the presence of the plaintiff at the trial. *Corbett v. Gibson*, 336
9. In a suit on a patent, after an inter-

locutory decree in favor of the plaintiff, the defendant applied to the Court for leave to file a bill to review the proceedings and the decree, and to amend the answer by setting up two French patents against the novelty of the plaintiff's patent, on the ground that, if the French patents had been in evidence, the decision would have been different. The application set forth, (1.) that the defendant was ignorant of the existence of the French patents until after the proofs were closed; (2.) that he did not know of their relevancy and materiality until after the decree was made and after he had employed new counsel; (3.) that the defendant's ignorance, and the insufficiency of a prior application, made after the proofs were taken and before the hearing, to admit said patents in evidence, was solely due to the inexperience and lack of legal knowledge of his former counsel; (4.) that, in selecting such counsel, the defendant was mistaken: *Held*, that the excuses offered were not sufficient to warrant the granting of the application, and that it was not clear that the result would have been different if the French patents had been in evidence. *De Florez v. Raynolds*, 397

See ADMIRALTY, 1 to 5, 7.  
COSTS, 3.  
CRIMINAL LAW, 7 to 9, 11, 13  
to 18, 20, 21, 25.  
FIRE INSURANCE, 6.  
PATENT, 10 to 14, 22.  
RAILROAD, 2.  
REMOVAL OF CAUSES.  
WRIT OF ERROR.

## PROCESS.

See PRACTICE, 7.

## PROMISSORY NOTE.

See RAILROAD, 1.

## R

### RAILROAD.

1. The trustees and managers of the Vermont Central Railroad Company

and the Vermont and Canada Railroad Company issued notes, to the amount of \$1,000,000, in sums of \$1,000 each, by which they, as trustees and managers only, reciting that it was in accordance with the votes of the stockholders of the two companies, and by virtue of a decree of the Court of Chancery of the State of Vermont and of a special Act of the Legislature of Vermont, promised to pay to the order of the defendant the sum, 20 years from date, with interest at the rate of 8 *per cent. per annum* payable semi-annually, at their office in Boston, on presentation of the interest coupons attached. The notes were signed by the trustees and managers, as such, and interest coupons, payable to bearer, for each instalment of interest, were attached. On each note was this endorsement, signed by the treasurer of the defendant, under its seal: "For value received, the Vermont and Canada Railroad Company hereby guarantee the payment of the within note, principal and interest, according to its tenor, and order the contents thereof to be paid to the bearer." The notes were put on the market, and C. purchased 50 of them at par and  $\frac{1}{4}$ , without notice in regard to them, beyond the general knowledge, open to all, of the location and situation of the railroads, and what appeared upon, and would be suggested by, the face of the instrument. C. sued the defendant to recover the amount of 2 coupons on each of the 50 bonds. The defendant admitted the "demand, notices and protest of said coupons, as they fell due." *Held*:

(1.) The defendant became liable upon the notes, as guarantor, to any one to whom the guaranty would run and who would be entitled to sue upon it;

(2.) Whether the guaranty was negotiable, *quere*;

(3.) The endorsement was a contract of endorsement, running to the bearer;

(4.) The admission as to demand, notices and protest, is sufficient to show that the liability of the defendant as endorser became fixed;

(5.) Interest at the rate of 7 *per cent. per annum*, and no more, can be recovered on the notes, with interest

at that rate, on such interest, as damages, from the time when payment should have been made. *Codman v. Vt. & Canada R. R. Co.*, 165

2. The plaintiff, owning first mortgage bonds of a railroad company, brought this suit, in this Court, to foreclose the mortgage and remove the two trustees, alleging that one was the sole trustee in a claimed preference mortgage of the same property, which he was seeking to foreclose in a Court of the State, in which proceeding the other trustee had been appointed a receiver of the property, and was in possession. There were demurrers, and a plea of the pendency of those foreclosure proceedings, and a plea of the filing of a cross-bill therein by the trustees of the first mortgage, for foreclosure, on the day after the filing of the bill in this suit, in which this plaintiff was named a defendant, and on whom process was served, by an order of the State Court, out of the State, before the service of the subpoena in this suit. The case was heard on the pleas set down for argument and the demurrers: *Held*,

(1.) This Court will not stay this suit until the proceedings in the State Court shall be completed;

(2.) This Court can and will proceed with this suit, although the property is in the possession of a receiver of the State Court, though it will do nothing to disturb such possession, or to interfere with the receivership;

(3.) The service of the process of the State Court on the plaintiff, as a defendant to the cross-bill, out of the State, was not effectual;

(4.) The fact that the mortgage trustees brought the cross-bill, did not draw the plaintiff in, and make him a party to it, by representation, as the trustees represent, in the suit, only the rights of such bondholders as join in it;

(5.) The position of the trustees is such that they cannot alone properly represent the bondholders, and no refusal by them to foreclose, after a request by the plaintiff, need be shown;

(6.) It is no objection to this suit that this Court cannot settle the accounts of the receiver. *Mercantile*

*Trust Co. v. Lamoille Valley R. R. Co.*, 324

## RECEIVER.

*See* NATIONAL BANK.  
PATENT, 6.  
RAILROAD, 2.

## REFERENCE.

*See* PRACTICE, 1 to 5.

## REMOVAL OF CAUSES.

1. A citizen of the District of Columbia brought a suit, in a State Court, against a subject of Great Britain. The defendant removed the case into this Court, under § 2 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470 :) *Held*, that, as the suit was not one between a citizen of a State and a foreign citizen or subject, it could not be removed. *Cissel v. McDonald*, 150
2. A citizen of the District of Columbia is not a citizen of a State. *id.*
3. A cause was noticed for trial by the plaintiff, at a term of the State Court, and a note of issue for that term was filed by the plaintiff. Both parties consented that the cause go off for the term, and it was not tried. After the term expired the defendant removed the cause into this Court, under the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470 :) *Held*, that the removal was not in time, not having been made before or at "the term at which said cause could be first tried." *Stough v. Hatch*, 233
4. Under §§ 2 and 3 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470, 471,) a suit may be removed into this Court from a State Court, on a petition by the defendant, averring that the defendant is a corporation created by, and a citizen of, one State, and that the plaintiff is a citizen of another State, without averring that the plaintiff was, at the time of the commencement of the suit, a citizen of a different State from

the defendant. *McLean v. St. Paul & Chicago Railway Co.*, 809

5. The defendant in a suit, after taking steps to remove it into this Court, did not file in this Court a copy of the record of the suit until three days after the day named in the removal bond as the day on which the copy of the record was to be filed. The case was not within the exceptions provided for in § 7 of the said Act. The plaintiff had not waived the delay, and the defendant offered no excuse except an allegation that the non-filing on the proper day was an inadvertence. The plaintiff moved to remand the cause: *Held*, that the motion must be granted. *id.*

6. W. brought suit in a State Court of New York against D. and K. and R., as co-partners, to recover on a promissory note. Process was served on D. alone. He alone appeared. W. and K. were, at the time the suit was commenced, citizens of New York. D. and R. were, at that time, citizens of California. D. took proceedings, under subdivision 2 of § 639 of the Revised Statutes, to remove the suit, so far as it concerned him, into this Court, without notice to the attorney for W. The petition for removal was not signed or verified by D., but by D.'s attorney in the suit. W. moved to remand the cause to the State Court: *Held*,

(1.) Subdivision 2 of § 639 of the Revised Statutes was not repealed by the Act of March 8d, 1875, (18 U. & Stat. at Large, 470;)

(2.) The suit was one in which there could be a final determination of the controversy, so far as concerned D., without the presence of K. and R., as parties;

(3.) Any rights which W. would have had as against K. and R., from serving process on D., remain to W. in this Court;

(4.) Notice of the application for the removal was not necessary;

(5.) The petition was sufficiently signed and verified. *Wormser v. Dahlman* 319

## S

## SEIZURE.

*See* ADMIRALTY, 6, 7.  
WRIT OF ERROR.

## SHIPPING.

*See* BOTTOMRY.  
CARRIER.  
CHARTER PARTY.  
COLLISION.

## SHIPPING COMMISSIONER.

1. The question of the salaries of employees in the office of the shipping commissioner of the port of New York, considered. *In re Shipping Commissioner*, 92
2. The question of allowing to be paid out of the receipts of the office in one year, expenses incurred in the previous year, and not then paid because the receipts of that year were not large enough for the purpose, considered. *id.*
3. The shipping commissioner has, under § 4,505 of the Revised Statutes of the United States, the power to appoint clerks with the title of deputy commissioners. *id.*

## STATUTE.

*See* TOWN BOND, 2, 4.

## STATUTES CITED.

## UNITED STATES.

1789, July 31st, Imports,	17
1789, September 1st, Crimes,	18
1789, September 24th, Jurisdiction,	151
1789, September 24th, Removal of Causes,	311
1790, August 4th, Imports,	17
1792, December 31st, Crimes,	18
1793, February 18th, Crimes,	18
1793, March 2d, Injunction,	46, 51
1799, March 2d, Imports,	15, 17, 18
1886, July 4th, Patent,	147, 158, 244, 248, 461
1842, August 23d, Practice,	6
1842, August 30th, Imports,	14

1861, March 2d, Duties,	219	916, Practice,	5
1863, March 3d, Removal of Causes,	317	917, Practice in Admiralty,	6
1864, June 3d, National Bank, 29, 30,	37, 39	919, Suits,	14
1864, June 30th, Internal Revenue,	189	941, Stipulations in Admiralty,	5
1866, July 18th, Imports,	14	970, Certificate as to Seizure,	547, 548
1866, July 27th, Removal of Causes,	316, 321	987, New Trial,	208
1867, March 2d, Bankruptcy,	51, 444	990, Imprisonment for Debt,	8
1867, March 2d, Removal of Causes,	314	1,037, Criminal Procedure,	341
1868, July 20th, Internal Revenue,	10	1,038, Criminal Procedure,	341
1868, July 27th, Removal of Causes,	317	1,891, Territories,	153, 154
1870, May 30th, Enforcement,	27	2,499, Duties,	216, 217
1870, July 8th, Patent, 149, 244, 248,	395	2,504, Duties,	216
1870, July 14th, Duties,	219	2,802, Imports,	18
1870, July 15th, Extension of Patent,	453, 466	2,809, Imports,	18
1871, February 28th, Navigation Rules,	545	3,049, Imports,	17
1874, June 22d, Bankruptcy,	112	3,082, Crimes,	14
1875, February 16th, Jurisdiction,	232	3,247, Distiller,	547
1875, March 3d, Jurisdiction, 48, 50,	150, 152, 188, 233	3,257, Crimes,	14
1875, March 3d, Removal of Causes,	309, 313, 319, 321	3,258, Crimes,	14
1876, July 12th, Mailing Obscene Mat- ter, 338, 342		3,259, Crimes,	14
1877, February 27th, Internal Revenue,	10	3,260, Crimes,	14
1878, June 19th, Passenger Tax, 296,	297	3,279, Crimes,	14
1879, March 3d, Jurisdiction,	340	3,292, Crimes,	14
		3,296, Crimes,	14
		3,296, Internal Revenue,	15, 16
		3,318, Internal Revenue, 9, 12, 18,	15, 16, 19, 20
		3,326, Crimes,	14
		3,340, Crimes,	14
		3,342, Crimes,	14
		3,360, Crimes,	14
		3,370, Crimes,	14
		3,380, Crimes,	14
		3,401, Crimes,	14
		3,393, Mailing Obscene Matter, 338,	342, 348
		4,187, Crimes,	19
		4,188, Crimes,	19
		4,233, Navigation Rules,	539, 544
		4,373, Crimes,	19
		4,374, Crimes,	19
		4,405, Navigation Rules,	545
		4,412, Navigation Rules,	545
		4,501, Shipping Commissioner,	102
		4,505, Shipping Commissioner,	92, 103, 104
		4,887, Patent,	383, 384, 395
		4,898, Patent,	148, 248
		4,919, Jurisdiction,	248
		4,919, Patent,	149
		4,921, Jurisdiction,	149, 244, 248
		4,972, Bankruptcy,	52
		4,979, Bankruptcy,	50
		4,980, Bankruptcy,	50
		4,986, Bankruptcy,	50
		5,046, Bankruptcy,	456, 460
		5,057, Bankruptcy,	460
		5,106, Bankruptcy,	51, 52
		5,121, Bankruptcy,	439, 441, 443, 444

# REVISED STATUTES OF THE UNITED STATES.

§ 563, Suits,	14
§ 629, Jurisdiction, 55, 149, 151, 244,	248
§ 630, Bankruptcy,	50
§ 639, Jurisdiction,	151
§ 639, Removal of Causes, 317, 319,	321, 322
§ 649, Trial by Court,	201
§ 650, Jurisdiction,	232
§ 652, Jurisdiction,	232
§ 691, Jurisdiction,	232
§ 693, Jurisdiction,	232
§ 700, Trial by Court,	301
§ 711, Jurisdiction, 149, 244, 248	
§ 720, Injunction, 46, 48, 49, 51, 326	
§ 725, Contempt,	7
§ 726, New Trial,	201
§ 914, Practice,	5, 201
§ 915, Practice,	5

§ 5,136, National Banks, 53, 56  
 § 5,440, Conspiracy, 15, 20, 21, 28, 29  
 § 5,443, Imports, 21, 25, 26, 28, 29  
 § 5,445, Customs, 65, 66  
 § 5,463, Forgery, 133  
 § 5,508, Enforcement, 27

#### MASSACHUSETTS.

1838, ch. 63, § 21, Insolvency, 446

#### NEW YORK.

1831, ch. 800, § 1, Imprisonment for Debt, 8  
 1832, ch. 158, City of New York, 414  
 1840, April 1st, Life Insurance, 195, 203  
 1857, April 14th, City of New York, 413  
 1858, April 14th, Life Insurance, 195, 205  
 1862, March 28th, Life Insurance, 195, 205  
 1863, April 24th, City of New York, 414  
 1866, April 18th, Life Insurance, 195, 205  
 1868, May 11th, Town Bonds, 192, 193  
 1869, April 19th, Town Bonds, 192, 193  
 1870, April 18th, Life Insurance, 210  
 Code of Procedure, § 12, Imprisonment for Debt, 8  
 Code of Procedure, §§ 548 to 550, Imprisonment for Debt, 8  
 Code of Procedure, § 1,240, Imprisonment for Debt, 8  
 Code of Procedure, § 1,487, Imprisonment for Debt, 8  
 Code of Civil Procedure, § 992, Reference, 200  
 Code of Civil Procedure, § 993, Reference, 201  
 Code of Civil Procedure, § 994, Reference, 201  
 Code of Civil Procedure, § 1,011, Reference, 200  
 Code of Civil Procedure, § 1,023, Reference, 200  
 Code of Civil Procedure, § 1,846, Reference, 201

#### VERMONT.

1867, Special Session Laws, No. 1, Town Bonds, 58  
 General Statutes, 237, sec. 97, Railroads, 169  
 General Statutes, 237, sec. 99, Railroads, 170

General Statutes, 249, sec. 21, Practice, 329

General Statutes, 296, sec. 48, Practice, 329

General Statutes, 344, sec. 17, Action, 181

General Statutes, 472, sec. 23, Married Woman, 186

General Statutes, 672, sec. 32, Fraud, 464

General Statutes, title 2, chap. 4, sec. 2, Public Officers, 57, 58

General Statutes, title 9, chap. 15, sec. 52, Selectmen, 59

General Statutes, title 9, chap. 15, sec. 53, Selectmen, 60

#### CANADA.

1872, June 14th, Patent, 393, 394

#### GREAT BRITAIN.

13 Eliz., ch. 5, Fraud, 464

27 Eliz., ch. 4, Fraud, 464

21 Jac. 1, ch. 3, Patent, 158

34 Anne, ch. 9, Promissory Notes, 56

10 Anne, ch. 23, Void deed, 465

7 & 8 Will 3, ch. 25, Void deed, 465

#### STEAM VESSEL.

*See* COLLISION.

#### STIPULATION.

*See* ADMIRALTY, 1 to 5.

#### SUBPOENA.

*See* PRACTICE, 7.

#### SURETY.

*See* ADMIRALTY, 1 to 5.

## T

#### TAX.

*See* INTERNAL REVENUE.

## TOWN BOND.

1. A town in Vermont issued bonds under seal, in aid of a railroad, with interest coupons attached, not under seal. Each coupon contained an express promise by the town to pay, and was payable to bearer, and was signed by the proper officer: *Held*, that assumpsit was a proper form of action on the coupons. *First Nat. Bank v. Bennington*, 58
2. The statute of the State of Vermont, under which the bonds were issued, having been held to be valid under the Constitution of the State, by the highest Court of Vermont, this Court followed such decision. *id.*
3. A national bank has, under § 5,136 of the Revised Statutes of the United States, authority to take and hold and sue upon such coupons. *id.*
4. In an action against a town in Vermont, on coupons from bonds issued by it in aid of a railroad, it appeared that the bonds were signed by only two of the selectmen of the town, although there were three in office at the time, the statute requiring the bonds to be signed by the selectmen. The highest Court of Vermont having held that, under the General Statutes of Vermont, (*title 2, chap. 4, sec. 2.*) a majority of the selectmen had as full authority as a full board to issue such bonds under such a statute, this Court followed that decision. *First Nat. Bank v. Arlington*, 57
5. A provision in the statute, that the bonds should be registered in the office of the town clerk, was held to be directory merely, and a want of compliance with such provision was held not to affect the validity of the bonds. *id.*
6. Evidence excluded of declarations made to tax payers before they assented to the issuing of the bonds, which induced them to assent. *id.*
7. After a majority of the tax payers of a town in Vermont had assented in writing to the issuing of bonds by

the town in aid of a railroad, and before the commissioners had certified to that fact, enough of the taxpayers to destroy the majority executed in writing a withdrawal of their consent and sent it to the commissioners, without going before them in person. The statute made no provision for dissent after assent. The commissioners disregarded the withdrawal and made the certificate: *Held*, that such withdrawal did not affect the validity of the bonds and that the decision of the commissioners was final. *First Nat. Bank v. Dorset*, 62

8. By the Acts of the Legislature of New York, of May 11th, 1868, and April 19th, 1869, (*Laws of New York, of 1868, chap. 811, p. 1,823, and of 1869, chap. 241, p. 447.*) commissioners appointed for a town were authorized to borrow money on the faith and credit of the town, "and to execute bonds therefor, under their hands and seals," in aid of a railroad. The commissioners executed bonds and delivered them to the officers of the railroad company. The bonds, when so delivered, contained a recital, over the signatures of the commissioners, that they were issued under the hands and seals of the commissioners. In a suit against the town, on coupons belonging to the bonds, by a person who purchased such coupons for value and *bona fide*: *Held*, that the town could not be allowed to show that the bonds were so delivered before any seals were affixed, and with the dates and numbers of the bonds in blank, upon the understanding that the bonds were not to be negotiated until certain conditions on the part of the company were fulfilled, but that, before such conditions were fulfilled, the officers of the company affixed seals to, and inserted the dates and numbers in, the bonds and negotiated them. *Phelps v. Town of Yates*, 192

## TRADE-MARK.

1. G., having a patent for an improvement in stoves, acquiesced, during the entire duration of the patent, in the manufacture and sale by M., of

stoves containing said improvement, with the name "charter oak" upon them. After the patent expired, M. continued to make and sell stoves containing said improvement, and to put the name "charter oak" upon them, but did not represent them as made by G. G., claiming the name "charter oak" as a trade-mark, applied to stoves containing said improvement, brought a suit to restrain the use of it by M., on such stoves: *Held*, that M. ought not to be so restrained. *Filley v. Child*, 376

### TRIAL.

*See* CRIMINAL LAW, 24, 25.  
FIRE INSURANCE, 6.  
PRACTICE, 1 to 5.

### TRUSTEE,

*See* RAILROAD, 2.

## U

### UNITED STATES MAIL.

*See* CRIMINAL LAW, 11 to 25.

### USAGE.

*See* FIRE INSURANCE, 5, 7.

## V

### VESSEL.

*See* BOTTOMRY.  
CARRIER.  
CHARTER PARTY.  
COLLISION, 1.

## W

### WRIT OF ERROR.

1. Whether an order of the District Court refusing a certificate of reasonable cause of seizure, under § 970 of the Revised Statutes, can be reversed by the Circuit Court, on a writ of error, *quere.* *United States v. Fre- richs*, 547

*See* JURISDICTION.

















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